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Copyright Royalty Board

**DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (WEB IV)**

**NATIONAL ASSOCIATION OF BROADCASTERS'
MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL**

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR
(2016-2020)

NATIONAL ASSOCIATION OF BROADCASTERS'
MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL

INTRODUCTION AND SUMMARY

The Motion to Compel filed by SoundExchange, Inc. against the National Association of Broadcasters ("NAB") on December 1, 2014 ("Motion") is improper and should be denied.

SoundExchange's motion seeks detailed financial information for the period 2011-2014 from the companies of four of the six NAB radio broadcaster witnesses. In support of its motion, SoundExchange represents that "NAB has refused to produce documents relating to its members' finances," Motion at 1, and "NAB expressly refused to produce *any* documents concerning or relating to revenues earned by NAB members that are derived from streaming." Motion at 4 (emphasis in original). Those representations are false.

Two NAB fact witnesses, John Dimick of Lincoln Financial Media Corp. ("LFMC") and Ben Downs of Bryan Broadcasting, discussed their respective companies' finances, including their streaming revenues and expenses. As SoundExchange is well aware, NAB produced substantial financial information for both of these companies, including statements showing

revenues and expenses related to streaming and radio broadcasting.¹ And, as to these two companies, the additional information now demanded by SoundExchange is simply not directly related to the testimony, as SoundExchange's strained explanations (or lack of explanation) demonstrate.

The two remaining witnesses at issue, Robert Kocak of Greater Media and Julie Koehn of Lenawee Broadcasting, did not submit testimony concerning their companies' streaming revenues and expenses or terrestrial revenues and expenses, let alone their companies' assets and liabilities (as would be shown on a balance sheet).² Moreover, as SoundExchange is well aware, and as Ms. Koehn's testimony expressly describes, Lenawee does not even stream sound recordings. It is unclear how SoundExchange could possibly argue that Lenawee's financial records (streaming or otherwise) are directly related to the case, let alone Ms. Koehn's statement.

Recognizing that it must meet the "directly related" standard in 17 U.S.C. § 803(b)(6)(C)(v), SoundExchange attempts to cobble together statements from various witnesses that look vaguely financial, and then demands voluminous financial records from all four witnesses. But there is a vast disconnect between the testimony proffered by these witnesses and the unrelated documents now demanded; in the words of SoundExchange opposing iHeart Media's motion to compel, the requests are totally "untethered" to the witnesses' testimony. In the end, SoundExchange's position effectively must be that it can demand financial information from the company of any witness, even when that witness has not

¹ The financial documents produced by NAB are attached hereto as Exhibits E and F. *See* Ex. E (LFMC financials – NAB00002988-89; 3032-40; 3083; 6154-6292; 6452); Ex. F (Bryan Broadcasting financials – NAB00003096-3101; 3105-07; 5642-5753; 6301-03).

² Mr. Kocak's written direct testimony mentioned (but did not quantify) expenses related to on-air talent. As discussed in the text, NAB is responding to a particularized request concerning these expenses.

put such matters at issue in his or her written testimony. That position is inconsistent with the statutory standard, has never been adopted by the Judges (including in the one order cited by SoundExchange, which also was decided under an earlier and broader standard), and certainly has not been followed by SoundExchange with respect to its own witnesses. Acceptance of that position would also have broad implications for companies' participation in future CRB proceedings, an effect that presumably is not lost on SoundExchange. Based on the testimony of the witnesses at issue, there is no basis to compel any further production from NAB and SoundExchange's motion should be denied.

BACKGROUND

The written direct case filed by the NAB included the testimony of six radio broadcasters. The testimony of two of the six, Steven W. Newberry of Commonwealth Broadcasting Corp. and Johnny Chiang of Cox Media Group, is not at issue. Two additional NAB witnesses, John Dimick of LFMC, and Ben Downs of Bryan Broadcasting, submitted testimony concerning, among other subjects, their companies' relative lack of commercial success with streaming and the effects of the current SoundExchange royalty structure. *See* Exs. A (Dimick) and B (Downs) hereto.³ Both of these witnesses included specific financial information designated as restricted in their testimony. In contrast, the final two NAB radio broadcaster witnesses, Robert Kocak of Greater Media and Julie Koehn of Lenawee Broadcasting, both submitted testimony that did not discuss streaming revenue or costs, nor did they generally discuss their company's revenues or profits or general financial issues. *See* Exs. C (Kocak) and D (Koehn). Instead, their testimony covered topics such as the importance of local personalities and programming to radio and record

³ Exhibits cited are attached to the Declaration of Michael L. Sturm, dated December 8, 2014, filed with this Opposition.

companies' efforts to promote their music on the radio. Because their testimony did not concern confidential financial matters, neither the testimony of Mr. Kocak nor the testimony of Ms. Koehn was designated as "restricted" under the protective order.

Following the submission of direct cases, SoundExchange propounded its first requests for production. On their face, the requests were incredibly broad, and demanded the production of extensive documentation from every one of the thousands of NAB members, without regard to whether those companies streamed sound recordings or had presented any testimony in the proceeding. There are six requests for production that supposedly form the basis for the present motion. *See* Motion at 4 (identifying Request Nos. 11, 25-29).⁴ Unsurprisingly, however, SoundExchange fails to quote them or discuss them specifically, because they are plainly overbroad and objectionable:

11. All documents concerning or relating to any revenues earned by NAB members that are derived from streaming.

25. For the years 2011 through the present, all audited and unaudited financial statements, at every level of specificity at which they are created or maintained, for each NAB member, including Lincoln Financial Media Company, Greater Media, Inc., Cox Media Group, Bryan Broadcasting, Inc., and Lenawee Broadcasting Company. Such financial statements include income statements, balance sheets, projections, profit and loss statements, budgets and cash flow statements, together with all supporting schedules, analyses and other materials related to, underlying, or used to support such statements.

26. For NAB members, including Lincoln Financial Media Company, Greater Media, Inc., Cox Media Group, Bryan Broadcasting, Inc., and Lenawee Broadcasting Company, for the years 2011 through the present, documents sufficient to show, for each broadcaster's terrestrial broadcast service business, and its

⁴ Despite the wording of the requests, SoundExchange has since dropped its request for documents from NAB members who did not submit testimony.

internet radio business, the broadcaster's total annual expenses, each source of expense incurred by the broadcaster, and the amount of each such type of expense, including but not limited to expenses from the following categories: (a) royalties for musical composition; (b) royalties for sound recordings; (c) marketing costs; (d) costs associated with promoting artists and recordings; (e) overhead, including, without limitation, salaries, health insurance, telephone, internet, facilities, etc.; (f) bandwidth; (g) development and maintenance of technology platform, software and system; (h) licensing fees; (i) third party commissions; and (j) all other significant expenses, identified individually, to the extent not otherwise produced in response to this request.

27. For NAB members, including Lincoln Financial Media Company, Greater Media, Inc., Cox Media Group, Bryan Broadcasting, Inc., and Lenawee Broadcasting Company, for the years 2010 through the present, documents sufficient to show, for each broadcaster's terrestrial broadcast service business, and its internet radio business, the broadcaster's total annual revenues, each source of revenue generated by the broadcaster and the amounts of such types of revenue, including but not limited to revenue from the following categories: (a) subscriptions (broken down by type of subscription); (b) advertising; and (c) all other significant revenue, identified individually, to the extent not otherwise produced in response to this request.

28. All short-term and long-term financial projections, forecasts, budgets or analyses reflecting the projected future financial condition of each NAB member, including Lincoln Financial Media Company, Greater Media, Inc., Cox Media Group, Bryan Broadcasting, Inc., and Lenawee Broadcasting Company, up to and including 2020, and including but not limited to projections or other forecasts concerning revenues, broken down by category of revenue and year, and costs, broken down by category of cost and year.

29. All documents or presentations provided to potential or actual investors, financial or investment analysts, Board of Directors, or any others concerning the projected costs, revenues, financial condition, business plans and strategies of each NAB member or the webcasting industry, as well as materials used in preparation of such documents or presentations, and documents used to prepare for calls or meetings with any such individuals.

Motion, Olasa Decl. Ex. A. NAB objected to these facially improper requests, for multiple reasons. *Id.* Ex. B.

Recognizing that both Messrs. Dimick and Downs had presented testimony regarding revenues and costs related to streaming, however, NAB produced relevant financial information provided by both LFMC and Bryan Broadcasting. For LFMC, income statements were produced for each of 2011, 2012, 2013 and 2014 (through August). These statements reflect station-by-station financial data for LFMC's music stations, as well as market-by-market information (for Denver, Atlanta, Miami and San Diego). The income statements also provide detailed financial information at the station level (all station operations) and the "interactive" level (which includes the streaming and other digital operations of LFMC). The income statements also provide "plan" information, reflecting budgeted amounts of tracked revenue and expenses. Last, for the stations and time period for which such data were tracked, LFMC provided the revenue associated directly with its streaming. *See* Ex. E (restricted financial information of LFMC produced by NAB).

For Bryan Broadcasting, NAB produced detailed profit and loss statements for 2011 through 2014 (September) for the company. Bryan Broadcasting also provided detailed transaction reports reflecting the revenues and expenses associated with its streaming operations for the same time period. *See* Ex. F (restricted financial information of Bryan Broadcasting produced by NAB).

During the meet-and-confer process, SoundExchange generally ignored the information that it received, as it continues to do in its motion, and never proposed any more limited, reasonable scope of follow-up financial requests, notwithstanding multiple invitations to do so by NAB. *See, e.g.,* Ex. G, Nov. 18, 2014 letter at 2 (noting that "[i]n our call, I asked if there were some limited subset of documents that might represent an accommodation. From your follow-up email, however, it appears that SoundExchange has simply reiterated all its requests

noted in your letter”); Ex. H, Nov. 17, 2014 email from K. Olasa to M. Sturm (and others). SoundExchange also failed to explain how the voluminous and intrusive records it was demanding were directly related to the statements of Mr. Kocak or Ms. Koehn.⁵ And SoundExchange refused to explain how it could demand financial documentation from NAB who had not presented financial information in their testimony, while simultaneously refusing to produce such information from its witnesses such as Darius Van Arman who did discuss finances in their testimony.

Throughout the entire process, it was readily apparent that SoundExchange’s goal was to file a motion to compel, not to reach an agreement. SoundExchange’s approach was exemplified by an 8:33 p.m. Eastern demand (subsequently withdrawn) that NAB accede to SoundExchange’s demands by 10:00 a.m. Eastern the next morning or face a motion. When NAB responded with a substantive proposal the following afternoon, SoundExchange did not engage and instead preemptively declared that the parties were at an impasse. *See* Ex. I (Nov. 20-21, 2014 email exchange). SoundExchange then filed this motion ten days later.

ARGUMENT

I. THE “DIRECTLY RELATED” STANDARD LIMITS THE SCOPE OF DOCUMENT DISCOVERY.

As SoundExchange recently noted in opposing a motion to compel filed by iHeartMedia, “discovery in these proceedings is far more limited than discovery in civil proceedings.” SoundExchange Nov. 21, 2014 Opposition to iHeart Media Motion to Compel at 13. Thus, a “participant in a royalty rate proceeding may request of an opposing participant nonprivileged documents that are directly related to the written direct statement . . . of that participant. Broad,

⁵ SoundExchange did abandon its demand for documents from Cox Media (Chiang) and Commonwealth Broadcasting (Newberry).

non-specific discovery requests are not acceptable.” 37 C.F.R. § 351.5(b)(1); 17 U.S.C. § 803(b)(6)(C)(v). SoundExchange further observed that the “‘directly related’ standard ensures that participants focus on the testimony and evidence presented by the opposing participants’ written direct statement. This is to be contrasted with the broad sort of investigative document discovery permitted under the Federal Rules of Civil Procedure because such discovery is incompatible with the timeframe and structure of these proceedings.” SoundExchange iHeart Opposition at 13. Thus, as SoundExchange noted, a request could not be sustained if it was “untethered” to the written direct testimony of the witness. *Id.* at 7. As set out below, SoundExchange’s demands here do not even approach meeting the standard that SoundExchange itself has advocated.⁶

II. NAB HAS PRODUCED FINANCIAL DOCUMENTS FROM LFMC AND BRYAN, THE COMPANIES OF THE TWO WITNESSES WHO TESTIFIED ABOUT STREAMING REVENUES AND EXPENSES.

SoundExchange’s motion suggests that NAB had refused to produce any financial documents. *See* Motion at 1 (“NAB has refused to produce documents related to its members’ finances”); *id.* at 4 (“NAB expressly refused to produce *any* documents concerning or relating to revenues earned by NAB members that are derived from streaming” (emphasis in original); *id.* at 6 (“[w]ithout any underlying financial documents, SoundExchange cannot test NAB’s contention and provide the judges with a complete record upon which to evaluate NAB’s claim”). But that

⁶ The one case cited by SoundExchange is not to the contrary. *See* Motion at 6 (citing *Order Granting in Part and Denying in Part Radio Broadcasters’ Motion to Compel SoundExchange to Produce Documents Related to Artist Witnesses*, at 1, Docket No. 2005-1 CRB DTRA (April 5, 2006)). In the first place, that decision was made at a time that the statute permitted broader discovery. *See* 17 U.S.C. § 803(b)(6)(C)(vi) (providing for the production of “relevant information and materials” but also providing that “[t]his clause shall not apply to any proceeding scheduled to commence after December 31, 2010”). In addition, unlike the situation here, the artists’ testimony that supported the requests was much more particularized and focused on financial issues, including financial returns of the business.

suggestion is false. NAB produced detailed financial information reflecting revenues and expenses for both LFMC and Bryan Broadcasting, including revenues and expenses related to their streaming operations. Thus, SoundExchange has the information relevant to the case.

The statements by Messrs. Dimick and Downs relied upon by SoundExchange confirm that this is the case. For example, SoundExchange notes that Mr. Dimick testified that “the revenue that we can directly attribute to streaming is relatively minimal” and that Lincoln has not sought to specifically quantify the portion of its non-streaming revenues and expenses that should be allocated to streaming. Motion at 3 (citing Dimick WDT ¶¶ 25, 28). SoundExchange also notes the statement by Ben Downs that “[streaming] has always resulted in losses to the company . . . [high royalties] combined with the cost of purchasing bandwidth and other overhead expenses, has resulted in significant losses to the company from its streaming operations.” Motion at 3,5 (citing Downs WDT ¶ 2). Statements like these – which are the ones SoundExchange specifically relies upon in support of its motion – are completely supported by the documents that have already been produced. The documents produced are also a complete response to SoundExchange’s claim that the requested records “could reveal that streaming is, in fact, profitable.” Motion at 6. SoundExchange has the relevant documents to test that theory.

SoundExchange’s primary complaint with respect to LFMC and Bryan would therefore appear to be its demand for “balance sheets for each year from 2011 to 2014.”⁷ Motion at 7.

⁷ SoundExchange also complains regarding the lack of “financial projections, forecasts or budgets.” SoundExchange argues that such documents could show a broadcaster’s “expectation that streaming will become profitable.” MTC at 6. Neither Bryan Broadcasting nor LFMC maintains projections or budgets of its respective streaming operations. However, the income statements provided by LFMC reflect both actual and “plan” (*i.e.*, budget) financial data and a comparison thereof, for each music-formatted station, at both the station level (all station operations) and the “interactive” level (which includes all digital operations). *See, e.g.*, Ex. E (NAB00003032-40; 6154-6292). Bryan Broadcasting has produced the one overall (footnote continued)

There is nothing in the Dimick and Downs statements, however, and SoundExchange points to nothing, that justifies this request. Neither Dimick nor Downs testifies concerning the overall assets or liabilities of his respective company. The request for balance sheet information is, therefore, completely “untethered” to and not directly related to the testimony. Depreciated values of FCC licenses and terrestrial radio towers, on the asset side, or corporate notes payable, on the liability side, simply have no bearing on the case and they are not discussed in the testimony. SoundExchange makes no specific argument in its motion as to why balance sheets are necessary, and it should not be heard to do so on reply. Accordingly, insofar as LFMC and Bryan are concerned, the motion should be denied.

III. NEITHER GREATER MEDIA NOR LENAWEE WITNESSES TESTIFIED ABOUT FINANCES AND THE REQUESTED DOCUMENTS ARE THEREFORE NOT DIRECTLY RELATED TO THEIR TESTIMONY.

In contrast to LFMC and Bryan Broadcasting, the statements submitted by Robert Kocak (Greater Media) and Julie Koehn (Lenawee) do not discuss (i) revenues from streaming, (ii) expenses related to streaming, (iii) profitability of streaming or lack thereof, (iv) projections for revenues or earnings from streaming, (v) the value of corporate assets (dedicated to streaming or otherwise), or (vi) corporate liabilities (related to streaming or otherwise). *See* Exs. C and D. As such, none of the requests at issue is directly related to either of these witnesses’ testimony.

The lack of any relationship between the testimony of these witnesses and the requests is confirmed by the only specific passages relied upon by SoundExchange. With respect to Mr. Kocak, the only statement that SoundExchange cites is: “[d]evelopment of new talent, or the introduction of talent to a new market, can require a substantial investment of time and

budget/forecast document that it has. *See* Ex. F (NAB00006303). Therefore, there is nothing further on this point to address.

marketing expense[;] . . . except perhaps in very small markets, nothing gets on the air without analysis, testing, refinement, and promotion, all of which cost money.” Motion at 4 (citing Kocak WDT ¶ 19). This unquantified and presumably uncontroversial sentence does not discuss or even relate to streaming revenues, costs, or profitability, nor does it pertain to anything that would show up on a corporate balance sheet, and it only discusses one specific aspect of radio expenses. There is no general discussion of radio expenses, and no discussion at all with respect to revenues or profits. SoundExchange does not, and cannot, argue to the contrary. And SoundExchange has shown that it is quite capable of asking a proper, directly-related request to the one aspect of expenses to which the statement does pertain:

Documents sufficient to show each NAB member’s expenditures, on an annual basis, for “on-air talent,” including the total amount of such expenditures, the number of on-air personalities retained, and expenditures broken down by category, including, but not limited to, the following categories: salary or compensation, expenditures related to the “development of new talent,” and expenditures related to the introduction of talent to a new market. *See* Kocak WDT ¶ 19.

NAB is producing relevant information for Greater Media in response to this request.

SoundExchange Second Request for Production No. 6. But SoundExchange cannot, as it seeks to do, use this single innocuous statement to demand a wide-ranging production of Greater Media financial information that simply has nothing to do with the statement made.

The same is true with respect to Lenawee, for slightly different reasons. As reflected in Ms. Koehn’s testimony, Lenawee does not even stream sound recordings, either under the statutory license or otherwise, so any streaming revenue Lenawee might have is unrelated to SoundExchange. Like Mr. Knight, Ms. Koehn does not testify concerning her station’s streaming revenues, expenses, or profitability, nor does she testify concerning any of Lenawee’s revenues, operational expenses, or assets or liabilities. *See* Ex. D. Thus, SoundExchange’s demands for this information are not related directly or otherwise to her testimony.

In its argument to the contrary, SoundExchange only relies on two snippets from Ms. Koehn's written direct testimony. First, SoundExchange notes her statement that she "is not aware of any small broadcasters who are streaming their broadcast programming and making a profit from it." Motion at 3 (citing Koehn WDT ¶ 22). But that statement by its terms speaks to Ms. Koehn's understanding as to other broadcasters, not Lenawee, which in any event is not streaming its general programming. The only other statement by Ms. Koehn that SoundExchange cites is that "[w]e donate over \$800,000 in cash and in-kind advertising and promotions each and every year." Motion at 4 (citing Koehn WDT ¶ 22). While that statement is at least quantified, it has nothing whatsoever to do with streaming. And if SoundExchange had truly thought that Lenawee's charitable contributions represented an important issue, it could have served a specific request (as it did with respect to Greater Media's talent-related costs). Having chosen not to do so, however, SoundExchange cannot bootstrap one sentence about charitable contributions into a demand for production of four years' worth of profit-and-loss statements and balance sheets, among multiple other demands.

In view of the obvious inability to tie its demands to the actual testimony of the witnesses at issue, SoundExchange makes a few additional arguments that warrant a brief response. For example, at various points in the Motion, SoundExchange inexplicably cites testimony by David Pakman, an expert witness for NAB and iHeartMedia. *See* Motion at 2, 3, 5. But neither Pakman nor his company is at issue in this motion; there is no precedent for SoundExchange to attribute his statements to unrelated witnesses who do not make the same point and then use that testimony to argue "directly related." Similarly, SoundExchange cites multiple statements from NAB's Introductory Memorandum. *See* Motion at 1, 2. Indeed, there are more quotes from the Introductory Memorandum than there are from Mr. Knight or Ms. Koehn. But there is no basis

for using statements from the Introductory Memorandum as a basis for demanding discovery from witnesses who plainly have not made supporting statements in their testimony. Indeed, one can only conclude that SoundExchange is arguing that by submitting any testimony to the Judges, even if it does not discuss financial matters or does so only in a very limited way, a witness necessarily exposes his or her company to broad-scale, invasive financial discovery. That position is not only precluded by the statute and regulations, it would have a significant effect on companies' willingness to participate and provide important testimony to the Judges.⁸

⁸ In a related matter, SoundExchange concludes its discussion by asserting that the "Judges should reject NAB's objection that the requested documents are not within NAB's possession, custody, or control." Motion at 7. Although NAB is not relying upon this objection as a basis for opposing the motion, and the Judges need not reach the issue, an association like NAB is in a very different position from an organization like SoundExchange, whose entire existence is based on litigating rate cases and collecting royalties. In presenting a case, NAB depends upon the cooperation of members; NAB cannot demand that its members produce documents and it therefore does not, in the real world, have possession, custody, or control of the documents of its witnesses' companies, and statements therefore must in some instances be conformed to what the companies are willing to support in discovery. And the fact that a company has agreed to support a witnesses' appearance does not, as SoundExchange suggests, mean that the testifying employee has *carte blanche* to produce documents. Nevertheless, as is evidenced by the insubstantiality of SoundExchange's complaints, NAB has produced (with the cooperation of its witnesses' companies) the documents that are directly related to the testimony provided by each witness.

CONCLUSION

For the foregoing reasons, the Motion to Compel filed by SoundExchange against NAB should be denied.

Respectfully submitted,



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Dated: December 8, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2014, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

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Andrew J. Blundell

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:)
)
)

Determination of Royalty Rates)
for Digital Performance in Sound)
Recordings and Ephemeral)
Recordings (Web IV))

14-CRB-0001-WR (2016-2020)

DECLARATION AND CERTIFICATION OF MICHAEL L. STURM
(On behalf of the National Association of Broadcasters)

1. I am counsel for the National Association of Broadcasters ("NAB") in the above-captioned case. I respectfully submit this declaration and certification pursuant to Rule 350.4(e)(1) of the Copyright Royalty Judges' Rules and Procedures, 37 C.F.R. § 350.4(e)(1), and per the terms of the Protective Order issued October 10, 2014 ("Protective Order") in support of NAB's December 8, 2014 Opposition to SoundExchange's Motion to Compel production of documents. I am authorized by NAB to submit this Declaration on NAB's behalf.

2. I am familiar with the documents produced, and I have also reviewed the definitions and terms provided in the Protective Order. After consultation with my client, my colleagues and I have determined that to the best of my knowledge, information, and belief, pursuant to this definition, certain of the documents produced are "Restricted," as they contain commercial or financial information that NAB has reasonably determined in good faith would, if disclosed, competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of NAB to obtain like information in the future.

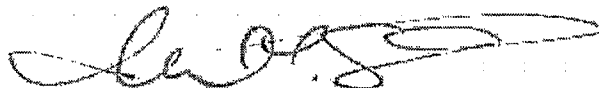
3. The material marked "Restricted" consists of non-public financial information provided to NAB under an obligation to maintain the information in confidence.

4. Under Rule 350.4(e)(1), I therefore declare that to the best of my knowledge, information, and belief, the material marked "Restricted" in the documents produced with the "Restricted" label meet the definition set forth in the Protective Order.

5. The material marked as "Restricted" must be treated as "Restricted Material" under the Protective Order in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling NAB to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: December 8, 2014
Washington, D.C.



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CERTIFICATE OF SERVICE

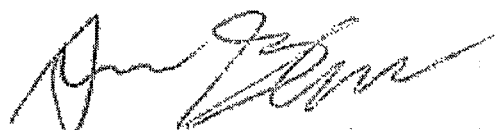
I hereby certify that on December 8, 2014, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

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<p>Harv Hendrickson, Chairman Russ Hauth 3003 Snelling Avenue, North Saint Paul, MN 55113 russh@salem.cc hphendrickson@unwsp.edu <i>National Religious Broadcasters Noncommercial Music License Committee</i></p>	<p>Jeffrey Jarmuth Law Offices of Jeffrey Jarmuth 34 E Elm St Chicago, IL 60611-1016 jeff.jarmuth@jarmuthlawoffices.com P: 312-335-9933 F: 312-822-1010 <i>Counsel for Accuradio</i></p>
<p>William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 P: 203-966-4770 Malone@ieee.org <i>Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.</i></p>	<p>George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com P: 615-242-9999 <i>GEO Music Group</i></p>

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<p>Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com P: 916-251-1600 F: 916-251-1731 <i>Educational Media Foundation</i></p>	<p>Gregory A. Lewis National Public Radio, Inc. 1111 North Capital Street, NE Washington, DC 20002 glewis@npr.org P: 202-513-2050 F: 202-513-3021 <i>Counsel for National Public Radio, Inc. (NPR)</i></p>
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<p>Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com P: 212-872-7483 F: 212-872-1002 <i>Counsel for Pandora Media, Inc.</i></p>	<p>Ethan Davis King & Spalding 1700 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006 adeavis@kslaw.com Tel: 202-626-5400 Fax: 202-626-3737 <i>Counsel for National Public Radio, Inc.</i></p>



Andrew J. Blundell



Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:)

Determination of Royalty Rates)
for Digital Performance in Sound)
Recordings and Ephemeral)
Recordings (Web IV))

14-CRB-0001-WR (2016-2020)

**DECLARATION OF MICHAEL L. STURM IN SUPPORT OF THE
NATIONAL ASSOCIATION OF BROADCASTERS' OPPOSITION
TO SOUNDEXCHANGE'S MOTION TO COMPEL
THE PRODUCTION OF CERTAIN FINANCIAL DOCUMENTS**

I, MICHAEL L. STURM, declare:

1. My name is Michael L. Sturm. I am a partner of Wiley Rein LLP, counsel to the National Association of Broadcasters ("NAB") in the above-captioned case.

2. I respectfully submit this declaration in support of the NAB's Opposition ("Opposition") to SoundExchange's Motion to Compel the Production of Certain Financial Documents filed on December 1, 2014. This Declaration is made based upon my personal knowledge and the documents referenced herein.

3. Attached hereto as Exhibits A and B are the Written Direct Testimony of John Dimick (Exhibit A) and Ben Downs (Exhibit B), as previously submitted in this case. Both contain certain restricted information covered by the Protective Order entered in this case.

4. Attached hereto as Exhibits C and D are the Written Direct Testimony of Robert Francis Kocak (Buzz Knight) (Exhibit C) and Julie Koehn (Exhibit D), as previously submitted in this case. There is no restricted information in either of these exhibits.

5. Attached hereto as Exhibits E and F are true and correct copies of financial documents produced by NAB on behalf of Lincoln Financial Media Corp. (Exhibit E) and Bryan Broadcasting (Exhibit F). These documents have been previously produced to SoundExchange. The entirety of these exhibits has been designated as restricted information covered by the Protective Order entered in this case.

6. Attached hereto as Exhibit G is a true and correct copy of a November 18, 2014 letter from me to Kuruvilla J. Olasa of Munger Tolles & Olson, LLP, cited in the Opposition.

7. Attached hereto as Exhibit H is a true and correct copy of a November 17, 2014 email from Kuruvilla J. Olasa of Munger Tolles & Olson, LLP to me (and others), including prior emails within the chain of communication, cited in the Opposition.

8. Attached hereto as Exhibit I is a true and correct copy of a November 20-21, 2014 email exchange between from Kuruvilla J. Olasa of Munger Tolles & Olson, LLP and me (as well as other individuals) , including prior emails within the chain of communication, cited in the Opposition.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: December 8, 2014
Washington, D.C.



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*Counsel for the National Association of
Broadcasters.*

Before the
COPYRIGHT ROYALTY JUDGES
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Washington, D.C.

In The Matter Of:

Determination of Royalty Rates
for Digital Performance in Sound
Recordings and Ephemeral
Recordings (Web IV)

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) 14-CRB-0001-WR (2016-2020)
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WRITTEN DIRECT TESTIMONY OF JOHN DIMICK
(On behalf of the National Association of Broadcasters)

Summary

1. My name is John Dimick. I am the Senior Vice President of Programming & Operations at Lincoln Financial Media Company ("LFMC"). I have 35 years of experience working in the radio industry, with the last seven years at LFMC. I offer this statement in support of the National Association of Broadcasters' Direct Case. My statement is based on my own experience in the radio industry, my personal knowledge of LFMC operations and financial matters, and my work with other LFMC employees.

2. I am providing this statement in order to describe the economics of Internet simulcasts of our over-the-air radio broadcasts. Simulcast streaming is very challenging financially and I expect it to continue to be so for the foreseeable future. While LFMC has been attempting to make streaming of our music stations profitable for many years, streaming is not now profitable and it never has been. One of the major reasons is the cost of sound recording royalties. These royalties are our largest streaming

expense by a substantial margin. I believe that lowering the applicable per performance rate applicable to streaming to \$0.0005 would result in lower direct costs for our streaming operations and would allow LFMC to more aggressively pursue streaming listeners.

3. I also provide this statement to emphasize that the success of radio, even music formatted radio stations, depends primarily on how we differentiate our stations from other radio stations. We must attract listeners by developing a relationship with them. Critical elements include our development of on-air personalities, community programming, community involvement, and contests and events. In addition, we invest substantial time and effort on developing our website content and Internet blogs, growing our social media presence, and improving our technology in order to engage listeners to the greatest extent possible. We have found that simply playing music will not improve ratings nor will it create a loyal listener base, primarily because music is not unique to us and does not differentiate our stations from their primary competitors.

4. Over-the-air radio and simulcast streams provide enormous promotional value to labels and artists. Labels and artists know this, as their behavior demonstrates. Labels and artists stay in constant contact with our programming personnel (in many different ways, including in-person contact), provide stations with notification and copies of new and pre-release music, engage independent third parties to promote their artists and recordings to broadcasters, and make artists available to stations for in-studio performances and appearances. My consistent experience is that radio is a key component of a new release becoming a hit or a new artist breaking out to become well known.

Professional Background

5. As Senior Vice President of Programming & Operations, a position I have held since 2010, I oversee all over-the-air and digital operations (which includes streaming and other interactive elements of our operations) for LFMC. Prior to assuming my current position, I was Vice President of Programming & Operations at LFMC, a position that I held from 2007 to 2010. From 2004-2007, I was the Program Director of HOT 97 (WHQT) in New York City, one of the most recognizable and listened-to stations in the country. Prior to that position, I was the Operations Manager for Jefferson-Pilot Communications Company ("Jefferson-Pilot") in San Diego from 1998 to 2004. Before 1998, I was the Program Director of WNCI in Columbus, Ohio (during which period I was promoted to Vice President of Programming) and before that I held programming positions with Fisher Broadcasting and KPLZ in Seattle, Washington. All told, I have overseen radio programming operations in numerous cities (including New York, Seattle, Denver, San Diego, Atlanta, Miami, and Salt Lake City), and with many different formats (including Top 40 (CHR), country, soft rock, adult hits, hip hop, sports, oldies, and classic hits).

6. I have a Bachelor of Arts degree. I am active in the National Association of Broadcasters, served on the Agenda Committee for Country Radio Broadcasters for several years, and was a Board Member for the Media Ratings Council from 2008 through April 2014.

Lincoln Financial Media Company's Radio Stations

7. Lincoln Financial Media Company operates radio stations in four of the top twenty media markets in the country. In 2006, LFMC acquired the radio stations of

Jefferson-Pilot. LFMC is based in Atlanta, Georgia and operates as a wholly-owned subsidiary of Lincoln National Life Insurance Company. The broadcasting operation of LFMC is a separate legal entity and is operationally and financially segregated from its parent company.

8. LFMC now owns and operates sixteen radio stations serving listeners in four markets: Atlanta, Denver, Miami, and San Diego. Ten of our stations have music formats and six are sports, comedy, or talk stations. All four of our markets provide radio broadcasts in analog and in digital "HD" transmissions. Our current station lineup is as follows:¹

Atlanta (9th Largest Market)²

WSTR Star 94 FM	Hot Adult Contemporary
WQXI ESPN 790 AM ("The Zone")	Sports

Miami/Ft. Lauderdale (11th Largest Market)

WMXJ Magic 102.7 FM	70s and 80s Classic Hits
WLYF 101.5 LITE FM	Soft Adult Contemporary
WAXY 104.3 FM /WAXY 790 AM ("The Ticket")	Sports

San Diego (17th Largest Market)

KBZT 94.9 FM	Alternative
KIFM Easy 98.1 FM	Soft Adult Contemporary

¹ In addition to HD1 broadcast of the primary station's programming, our stations also broadcast the following additional HD channels: WSTR HD2 (Simulcast of ESPN 790 AM - The Zone); WSTR HD3 (Mainstream Urban "Streetz 94.5"); KYGO HD2 (Simulcast of 103.1 Comedy); KQKS HD2 (Mile High Sports); WMXJ HD2 (Oldies-1950s and 60s); WMXJ HD3 (Simulcast of WAXY AM); KIFM HD2 (Smooth Jazz); KBZT HD2 (Bob Radio); KBZT HD3 ("Glow" Dance Music); KSON HD2 (Legendary Country). We stream all of the HD1 stations, as well as KSON HD2 and KBZT HD2 and HD3. LFMC tracks revenue, expenses, performances and royalties for these HD stations as part of the licensed station for which they are associated.

² Market rankings are per Nielsen.

KSON/KSOQ FM	Country
--------------	---------

Denver (19th Largest Market)

KYGO 98.5 FM	Country
KQKS 107.5 FM	Rhythmic Top 40
KKFN 104.3 FM ("The Fan")	Sports
KEPN 1600 AM ("The Zone" – Sports),	Sports
Comedy 103.1 FM	Comedy
KWRZ 950 AM	Oldies

9. LFMC's stations are leaders and innovators in the industry. For example, LFMC's San Diego KIFM Easy 98.1 FM was nominated as a 2014 NAB Marconi Radio Award finalist for Station of the Year and received the 2005 NAB Macaroni Award for Smooth Jazz station format. Several other LFMC stations have also won NAB Marconi Radio Awards: Denver KQKS (2014 award for Best Contemporary Hits format station); Denver KYGO (2011 award for Best Country format station); Miami WMXJ (2009 award for Oldies format station); and San Diego KSON (2012 award for Station of the Year (large market)). KYGO has been a finalist for the Country Music Radio Station of the Year Award seven times, and has won the category three times (including 2009).

Lincoln Financial Media Company's Streaming Operations

10. LFMC's stations began streaming in the late 1990s when they were owned by Jefferson-Pilot Communications. During the 2002-04 time period, Jefferson-Pilot elected to stop streaming due to issues with advertising agencies regarding the right to transmit radio advertising over the Internet. In around 2005-06, the stations began streaming again because they were able to replace over-the-air commercials with other material to avoid these issues.

11. LFMC now streams all of its stations. For in-market listeners, these streams are simulcasts of the over-the-air broadcasts; the stream is virtually identical to the over-the-air broadcast, with the only potential difference being minor commercial changes. The stream is also identical for out-of-market listeners with respect to non-commercial program content, but we replace more commercials for out-of-market listeners at the request of our advertisers and to obtain additional ad insertion revenue.

12. We limit access to most of our streams to the continental U.S. At our direction, most listeners outside of the U.S. are blocked from receiving the stream by our streaming provider. Our Miami and San Diego stations permit out-of-country streaming to the Caribbean and Mexico, respectively. In June 2014, we limited our KWRZ 950 AM station to the state of Colorado. We have also adopted measures to limit streaming sessions to ninety minutes. These timing and geographic restrictions have been implemented to reduce costs and avoid potential out-of-country license fees.

13. Our streaming provider is Triton Digital, which provides the technology backbone for the stream for all of our stations. We have used Triton Digital (previously Ando Media) to provide streaming services since approximately 2009.

14. LFMC's stations are streamed through each station's website, through TuneIn, a website and mobile streaming application, and through station applications available for mobile devices. LFMC streams in order to provide another way for our audience to hear our radio programming. Part of the value we provide as a broadcaster is enabling our listeners to hear our programming in the car, at work, in their home, and wherever else they may be.

The Challenges We Face in Monetizing Streaming

15. LFMC has worked hard to monetize our streams, but this effort has not met with great success. I do not believe that we are alone in this regard; I understand from colleagues in the industry that few broadcasters are able to boast a profitable streaming operation. In the current environment, streaming presents broadcasters with numerous economic challenges.

16. As discussed in more detail below, the cost of streaming far outweighs the revenue we can earn from the stream. This has been the case for many years, and we foresee it being the case for at least the next several years.

17. The sound recording performance royalties increase with every additional listener. However, an incremental listener does not necessarily bring any additional revenue. This disincentivizes expansion of our streaming audience. There is no reasonable likelihood of earning additional revenue to cover the increased royalty fees, let alone to make a profit. It has simply not been the case that such additional revenue from streaming is readily available. This is true even for the major markets in which we operate (Atlanta, Miami, Denver and San Diego).

18. There is a marketplace gap in how advertisers value simulcast streaming. Many of our advertisers are unwilling to pay anything extra for inclusion of their advertisements on our streams. Many even take the position that streaming should be thrown in for free. Although I believe advertisers understand that there are some listeners for the stream, a major problem with converting that understanding into advertising dollars has been the lack of a demonstrated audience or a consistent ratings boost based on the streaming listenership. While streaming audience measurement remains in its infancy, advertisers have a high comfort level with over-the-air ratings. Radio

advertising rates are based on well-established ratings information and broadcasters generally have not been able to provide accepted ratings data with respect to the streaming listenership.

19. As part of our effort to monetize streaming more effectively, we recently moved to Nielsen's Total Line Reporting ("TLR") for our music stations, which is a change in ratings methodology provided by Nielsen that provides (i) ratings for a broadcasters' stream on a station-by-station basis, and (ii) a cumulative overall rating for a station (that is, a cumulative rating for the over-the-air broadcast and the streaming simulcast). Some of our stations moved to Nielsen TLR in September 2013, while others were transitioned in early 2014. Nielsen TLR has strict compliance requirements and has been endorsed by the Media Ratings Council.³ We moved to Nielsen TLR because the revenue from ad insertion on the stream and streaming pre-roll advertisements was minimal and because the ad insertion technology resulted in a lower quality sound for the streamed programming. We could not sell all of the time available on the stream (for ad insertion) and what we could sell was at unacceptably low rates. As part of our effort to sell available streaming time, we engaged third party brokers for this activity (Katz and Triton), which further diminished our revenue because of commissions. Despite all of our efforts, we could not sell all of the available advertising time. This resulted in excessive runs of public service announcements and duplicative advertising, which degraded the listening experience. We moved to Nielsen TLR with the goal of capturing the streaming audience within our Nielsen rating, thereby perhaps obtaining increased advertising rates. We hope that the Nielsen TLR will allow advertisers to accept and value our streaming

³ In order to participate in the Nielsen TLR, LFMC is required to fully simulcast its over-the-air program, with very limited exceptions.

audience, but we cannot be sure that will occur. Even if it eventually does, stream audiences remain a very small fraction of our over-the-air audience despite the fact that we have been streaming continuously for more than eight years.

20. The Nielsen TLR reports we have received show that streaming has not had a material effect on our audience ratings. For example, for KQKS (Denver – Rhythmic Top 40), KYGO (Denver – Country), and WMXJ (Miami – 70s and 80s Classic Hits) our Nielsen reports reflect virtually no streaming audience since we began TLR for those stations. That is, in 2014 there are no recorded AQH Persons⁴ for our relevant age demographic for these stations, no independent AQH Rating⁵ for those stations and, therefore, no increase in the total rating (terrestrial plus the stream) for those stations. We have had slightly more success with WLYF (Miami – Soft Adult Contemporary); however, even that station’s AQH Persons is a small fraction of its terrestrial AQH Persons. The stream garners no independent AQH Rating, and it has only increased the overall AQH Rating by a 0.1 in January and August of 2014.

21. These low and inconsistent figures do not allow us to argue forcefully to advertisers that they should pay more because our over-the-air programming is also streamed. Advertisers base their buys and the rates they are willing to pay on consistent, demonstrated ratings. An upward flicker in the rating of 0.1 (the smallest possible increase) will not enable LFMC to demand more for its spots.

⁴ Nielsen defines AQH Persons as the “average number of persons listening to a particular station for at least five minutes during a 15-minute period.”

⁵ Nielsen defines AQH Rating as the “AQH Persons estimate expressed as a percentage of the population being measured.”

22. Despite the challenges, LFMC actively seeks revenues from its streams. Sales staff have both over-the-air revenue targets as well as targets for our “interactive” audience (which includes revenue from our websites, social media, texting, streaming and contesting). Growth of our digital and streaming revenue is a focus of LFMC and our executives and managers are charged with making streaming a profitable enterprise.

Streaming of our Over-the-Air Broadcast is Done at a Loss

23. Streaming currently loses money for LFMC’s music stations. Presently (2014), our direct revenue for streaming comes from (i) pre-roll advertisements (that is, advertisements that precede the stream once a listener clicks on the “listen now” button), and (ii) ad-insertion for our out-of-market listeners.⁶ We do not believe our listeners would pay a subscription fee to receive our streams.

24. LFMC has put accounting procedures in place for tracking streaming revenue at all of our stations. We have done so in an effort to more carefully track the revenue and expenses associated with streaming; however we have historical streaming revenue data only for our Denver and Miami markets.⁷

25. As can be seen from the table below, revenue that we can directly attribute to streaming is relatively minimal. Revenue also drops off in 2014 (as compared to 2013), because we now have less ad insertion revenues from the stream due to our move to Nielsen TLR. The move to Nielsen TLR, however, was intended to allow us to capture our total listening audience (over-the-air plus streaming), thereby potentially

⁶ Prior to our implementation of Nielsen TLR, we inserted ads more frequently within market.

⁷ Our Atlanta and San Diego markets have not yet been able to implement the new procedures for tracking streaming revenue and expenses.

improving our ratings. As discussed above, we have not yet seen the ratings boost necessary to drive additional advertising revenue.

26. As can be seen from the table, the revenue attributable to the stream is almost the same as, or is exceeded by, LFMC's applicable performance royalty fees for our Miami stations in 2013. Likewise, the performance royalties are more than half of the streaming revenue for our Denver stations in 2013. In 2014, the applicable performance royalties are outpacing our streaming revenue for three of the four stations reported below. The amount paid to SoundExchange grew consistently from approximately [[

]] in 2013. The decline in royalty fees was due to our geofencing and limitations on the amount of streaming time. For 2014, royalties are on track to be approximately the same as 2013, perhaps slightly above. The fees paid to SoundExchange are, by far, the single largest expense that we track for our streaming operations. They exceed the total of our streaming connectivity costs, ad insertion fees, and composer royalty fees.

27. Obviously, music performance royalties are not the only expense associated with streaming. We have at least three other major expenses directly attributable to streaming: (i) the cost of the stream itself (fees paid to Triton), (ii) our costs for insertion for advertisements into the stream (tracked as "scheduling" fees), and (iii) our additional composer royalty fees for ASCAP, BMI and SESAC. If these costs are taken into account, the non-viability of streaming as a stand-alone financial operation becomes even more clear, with each of the four stations operating at a loss for 2013 and 2014:

Time Period	Station	Streaming Revenue ⁸	Sound Recording Royalties paid to SoundExchange	Streaming Bandwidth, Scheduling, Composer Royalties ⁹	Approximate Loss
2013 (full year)	Miami WLYF	[[]]	[[]]	[[]]	[[]]
	Miami WMXJ	[[]]	[[]]	[[]]	[[]]
	Denver KYGO	[[]]	[[]]	[[]]	[[]]
	Denver KQKS	[[]]	[[]]	[[]]	[[]]
2014 (through 8/31)	Miami WLYF	[[]]	[[]]	[[]]	[[]]
	Miami WMXJ	[[]]	[[]]	[[]]	[[]]
	Denver KYGO	[[]]	[[]]	[[]]	[[]]
	Denver KQKS	[[]]	[[]]	[[]]	[[]]

28. There are additional costs of streaming as well. Executives, including myself, our head of Digital Strategy, and our station managers and advertising

⁸ These revenues are net of the advertising commission paid. 2014 direct streaming revenues are tracking to be materially lower than 2013 because ad insertion revenue is down sharply due to our transition to the Nielsen TLR.

⁹ LPMC tracks the SESAC fees applicable to streaming; however, ASCAP and BMI fees applicable to streaming are not specifically tracked with respect to streaming. Therefore, the ASCAP and BMI fees included herein were calculated using the direct streaming revenue multiplied by the applicable ASCAP / BMI license fee of 1.7% (for the base fee) x 75% (for streaming). Last, streaming bandwidth and schedule fees were taken from LPMC's standard profit and loss statements, which are rounded to the nearest thousand dollars.

executives, must spend a portion of our time on our streaming operations. These individuals must ensure that the technical requirements of streaming are met, which includes interacting with and overseeing Triton, ensuring our other technology is functioning properly to enable the stream, staying abreast of technical innovations, and overseeing applications development. There are other functional requirements and hard costs, such as implementing accounting policies to track streaming revenue and expenses, costs of applications development, etc. While we have not specifically quantified these costs, they undoubtedly are real and increase our loss on our streaming operation. Furthermore, to the extent we can ever confidently allocate a portion of over-the-air net advertising sales to our stream based on Nielsen TLR or other data, such an allocation would have to take into account the costs associated with the programming included in the streamed content, as well as the sales and marketing costs associated with the over-the-air advertising. Indeed, if streaming is viewed as an independent operation, our streamed music stations are already getting the benefit of fully programmed content (music selection and organization, on-air personalities, contests, etc.), the costs of which are not reflected in the above figures.

29. In sum, SoundExchange royalties are the greatest impediment to the financial viability of our streaming operations. If we convert an over-the-air listener to a streaming listener (or to a listener of both over-the-air and streaming), our costs increase. Furthermore, there is no benefit to us because of scale - we pay the same amount of royalties for our first streaming listener as we would for our millionth listener.

Our Non-Music Programming is Critical to the Success of our Music Stations

30. Six of our stations are sports or comedy formatted stations that broadcast little or no music. Our remaining ten stations have music formats. Differentiating our station programming is critical to our success particularly for our music-formatted stations, because everyone has access to the same music. We have competitors in our markets with similar music formats, so we must differentiate our stations and attract listeners with personalities, contests, social media, Internet blogs, events, and other programming.

31. Our on-air personalities are an important part of differentiating our music-formatted stations. Our music stations typically have morning, mid-day, and afternoon (drive-home) personalities. Depending on the station, on-air personalities can be our number one priority in terms of programming decisions. We search for and develop good talent and we highly compensate that talent as well. We attempt to groom our personalities for higher ratings time slots. In sum, all of our competitor music stations are playing roughly the same music; however, the on-air personalities distinguish one station from another.

32. Our morning shows on KQKS (Larry, Kendall & Kathie Show) and KYGO (Ryno & Tracy Show) are top morning shows in Denver. These programs draw listeners and drive advertising revenue. The personalities are paid salaries reflective of their importance to the success of the stations. A great morning show can even draw listeners from outside the base music demographic of the station. On the other hand, an unsuccessful morning show can require substantial resources and expense to get back on track. For example, we are in the process of retooling the morning show on WSTR in Atlanta because the show has not been effective.

33. LFMC stations also serve their communities in many ways. We take seriously our obligation to operate our stations in the “public interest, convenience and necessity.” Our stations provide the basic information listeners expect from radio, such as providing news, weather, school closings, and traffic updates. Of course, we also broadcast emergency information.

34. We go beyond these basic obligations by engaging in, and informing listeners of, other community activities. We announce community events over-the-air and display them on our websites. For example, our station websites have links to dozens of community events, including charity walks, art events, food and wine festivals, pet adoptions, children’s activities, clothing drives, etc. NAB Ex. 2. Station personalities often appear at these events in order to engage with listeners directly and increase station awareness, for example, by participating in a walkathon or bike ride for a particular charitable organization, or attending a food festival.

35. We also organize and sponsor events and fundraising, raising substantial funds for important organizations. NAB Ex. 3. For example,WSTR in Atlanta hosted its 6th annual Little Black Dress party in early September 2014, benefitting, for the past three years, the Young Survival Coalition, a breast cancer organization aimed at assisting young women facing this disease. This event has raised over \$70,000 since its inception in 2008. KSON in San Diego hosted its 26th Annual Radiothon in December of 2013, which has raised over \$11 million in the past 25 years for the benefit of St. Jude Children’s Research Hospital. We often broadcast these events in their entirety, or cut to the events for brief periods during our over-the-air programming.

36. Contests and promotions, such as Denver KYGO's Workday Payday contest where listeners have the chance Monday through Saturday to win \$100 an hour from 9am-4pm, are an integral element of creating brand loyalty. NAB Ex. 4. WLYF provides a chance to win up to \$1,000 five times a day, including mid-day working hours. A popular contest or promotion can draw attention to a station and thereby attract new listeners. We believe that it also may increase streaming listenership by encouraging working listeners to tune-in throughout the workday.

37. We also put a great deal of effort into our Internet presence to grow and reinforce our stations' brands and to directly connect to our audience. Various LFMC stations use different approaches, but many have blogs aimed at certain listener groups, tributes (for example, to overseas troops), contests, events, local news and traffic, and a presence on Twitter, Instagram, Facebook, and Pinterest. NAB Ex. 5.

38. Many of our stations have blogs that focus on listener interests. For instance, our Denver KQKS Morning Show has a blog, which primarily focuses on humorous items of interest. WSTR in Atlanta has Cindy's Mommy Blog focusing on "All Things Mommy" and San Diego's KIFM has an Easy Blog that covers a wide variety of topics such as entertainment, events, food, health, lifestyle, music, and San Diego news.

39. Our websites provide an important connection for the local events that are discussed above. They also serve to honor local individuals. For example, KYGO in Denver has a "Wall of Honor" recognizing the sacrifice of Colorado men and women serving away from home. NAB Ex. 6.

40. In addition, all of our stations have a presence in social media – Twitter, Instagram, Facebook, and Pinterest – so that listeners can interact directly with our on-air talent. This facilitates building relationships with individual listeners and, even more importantly, a community of listeners, to a station or particular program. NAB Ex. 7.

Our Broadcasts Provide Promotional Value for the Music We Play

41. We also go to great lengths to provide an enjoyable music experience to our listeners—identifying and playing the music they want to hear, introducing them to new songs and artists, and selecting and organizing music for our listeners. Our program directors, music directors and on-air personalities have extensive knowledge of the musical genres they program.

42. The nature of our industry is such that we develop relationships with labels, promoters and artists. Radio stations are important outlets through which record companies can introduce new artists and songs to listeners (prospective music purchasers). I strongly believe that record labels and artists agree and that they remain focused on obtaining airplay for their songs. My personal experience, which includes being a program director in several major markets including New York City, is that record labels and artists devote a great deal of energy and money to ensuring that radio stations have their music and will play that music. We engage with labels, promoters and artists regularly in this regard; however, our focus is on our listeners and we make artist and song selections for airplay based on our own judgment, which includes our experience and knowledge of our listeners.

43. In my experience, record label promotional activities directed to radio have remained strong over the past decade. There has been some change because of label

mergers and cost cutting; however, I think the level of intensity and focus remains the same. Some of the promotional activity comes in different forms now – for example, we get more email blasts of new releases from labels, as these are lower cost communications. I have not seen, however, a change in attitude from the labels in terms of their view of the value of radio play for their artists.

44. Record labels continue to heavily promote their music to radio programming personnel in many different ways. I polled our program directors for several stations with respect to the level of promotional activity from labels. Live communications (in person meetings and phone calls) remain one of the key ways label and independent promoters seek the attention of programming personnel.

a. Our program directors are constantly interacting with labels and independent promoters of music. Our Program Director for KSON (San Diego – Country) advised he interacts with 32 record label representatives and approximately eight independent promoters on a regular basis, taking calls throughout the week and during scheduled music call times once per week. Our KYGO Program Director in Denver has lunches and dinners with label representatives about ten times per month, and is regularly interacting with about ten label representatives via phone, email and text. Our Atlanta Assistant Program Director/Music Director speaks with twenty different label representatives per week. My experience is that such regular contact is pervasive throughout the industry.

b. Some of our program directors set aside particular times to speak with label personnel. Scheduled appointments are sometimes necessary to limit

the amount of time spent with labels. It is important to note that stations and markets are different. For example, in Atlanta, we may get more "in-person" promotional activity, as many label personnel maintain homes here, while our Denver stations might receive more calls and email communications.

c. Radio station music programmers can receive a great deal of attention of from the labels (especially those at high profile stations). My experience at HOT 97 in New York, where I was the programming director, was that both the music director and I were bombarded with requests for airplay and air time. HOT 97 was and is an important Hip Hop station that can take an artist from obscurity to success simply by playing his or her music. Artists would ask for our music director to come to recording sessions, listen to unreleased music, and help identify the best song for airplay. Promoters would beg for our time and airplay. We could have spent virtually all of our available time interacting with artists and labels in this way.

d. Record labels will also invite our programming staff to "off-site" events. This often includes taking program personnel to artist concerts and performances. Labels use these types of events to help build relationships with stations and encourage airplay for the music they are promoting.

45. We also receive email communications from promoters asking us for airplay, requesting meetings, identifying new releases and artists, informing us of hits and airplay of their artists by other stations, etc. NAB Ex. 8. We also receive acknowledgements and messages from labels and promoters thanking us for our role in making their song, album or artist a success. NAB Ex. 8. Our stations and program

directors have scores of elaborate plaques presented to us by the labels recognizing our role in their success and sales. NAB Ex. 9.

46. Labels and independent promoters continue to send us new music. Our program directors informed me that, on average, they receive 5-10 new singles a week from labels, which come in the form of CDs and digital .wav files. Our stations may only add a few new songs each week, so the labels are vying for these spots. LFMC programming personnel also receive a few new full length CDs per month. Additionally, we receive new music through online music services (*e.g.*, PlayMPE). Our program directors have accounts with these services and labels will identify music to our program directors through these services, making the music available for downloading. We also receive email blasts of new releases. Labels will also frequently ask our program directors for feedback on new artists and music. For example, they may ask for our opinion on which single of a new album should be played on the air. This reflects the value that labels place on our distribution capabilities as well as our expertise in knowing what will become a hit.

47. In addition to sending us current music and interacting directly with our program directors, artists at the behest of their labels – will give their time to our stations, providing interviews, attending events, performing, recording station liners and video greetings, and interacting with local fans. Artists and labels do so in order to strengthen their ties to our stations and obtain our support. For artists with whom we have strong ties, we may give their new music additional consideration and perhaps make room for their new release or take a risk that we might not take for another artist. It is my experience that this is the case throughout the industry and the labels foster and rely on

these relationships. There is time and great expense associated with some of these activities and I simply do not think the labels would incur these expenses unless they believed that there was a significant benefit to them.

48. For example, numerous artists visit our stations for interviews and in-studio performances. For KSON in San Diego (Country format), the following artists have visited the stations since May 2014: Justin Moore (Valory Records); Dylan Scott (Sidewalk Records); Dean Alexander (WEA Records); Olivia Lane (Big Spark Music Group); Jackie Lee (Broken Bow Records); Kelsea Ballarini (Black River); Hunter Hayes (Warner Bros); Kristian Bush (Streamsound Records); Samantha Landrum (Star Farm Entertainment). For KQKS in Denver (Rhythmic Top 40), we have had the following artists visit the station in the past six months: Lil Jon (Epic); G-Eazy (RCA); August Alsina (Def Jam); TydollaSign (Atlantic); Jeezy (Def Jam); Wiz Khalifa (Atlantic); Rico Love (Interscope); Adrian Marcel (Republic); Schoolboy Q (Interscope). In Atlanta, recent station visits include: Hilary Duff (RCA); One Republic (Interscope); Echosmith (Warner Brothers); Matt Nathanson (Vanguard); Paramore (Roadrunner); Eric Hutchinson (In2une); Neon Trees (Island); Us The Duo (Republic). There are many other examples.

49. Artists will often perform at specific events that we arrange. These might be charity events or contest winner events. For example, Ed Sheeran (Atlantic Records) performed at the Star Lounge on July 8, 2014, for 100 of our winners of A-List Lounge. Better Than Ezra (ADA Records) performed at our "Little Black Dress Party" on September 6, 2014, which, as I mentioned above, was for the benefit of a local breast cancer charity. Christina Perri (Roadrunner) performed at the Star Lounge on August 20,

2014, at the Marietta Museum of Art, for 100 winners of our New Music Room Live contest. These performances were provided at no charge¹⁰ and we organize similar events in all of our markets. While these events are good “branding” for the labels and the artists, labels also use them to build their relationships with our stations.

50. Record labels provide other benefits to our listeners and fans at no charge to LFMC, such as concert tickets and trips, backstage passes and autographed merchandise. Although not quite as popular now as in the past, labels have also provided large quantities of CD’s for on-air giveaway to help advertise that new music is in stores and available for purchase. There are also private “meet and greets” as well as offers for exclusive sound check parties for our listeners. All of this is done to expose potential consumers to the artist and the artist’s new product.

51. Because our music station streams are simulcasts of our over-the-air broadcast, their music content is the same. The promotional effect of the music played is, therefore, no different. I have never had an artist or label tell me they did not want their music broadcast on our stream. In fact, our streaming technology has the added promotional effect of displaying the title, artist and album, as well as the ability to “tag” the song for future purchase on the stream display, which would facilitate the purchase of the music by the listener.

¹⁰ We do pay for travel and incidental expenses, if needed.

Conclusion

52. Over the course of nearly a decade LFMC has made a serious effort to make streaming a financial success. We have yet to achieve that goal, or even reach a break-even point, primarily because the royalty rates for sound recordings present such an obstacle. Although we are moving to a new model using Nielsen Total Line Reporting, I have not seen evidence that the situation will be fundamentally changing in the near to medium term. Unfortunately, many advertisers are unwilling to pay for streaming ads, and certainly not at rates that would cover royalties and all of the other costs associated with streaming. For the time being, in my view, the primary beneficiaries of our streams are the record labels, who receive the promotional benefit of their music being on our stream while we incur all of the associated costs.

Before the
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In The Matter Of:

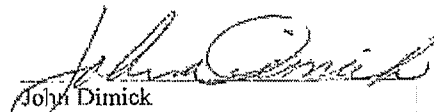
Determination of Royalty Rates
for Digital Performance in Sound
Recordings and Ephemeral
Recordings (Web IV)

14-CRB-0001-WR (2016-2020)

DECLARATION OF JOHN DIMICK

I, John Dimick, declare under penalty of perjury that the matters set forth in my
Written Direct Testimony in the above-captioned proceeding are true and correct to the
best of my knowledge, information and belief.

Executed this 7th day of October 2014.


John Dimick

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:)

Determination of Royalty Rates)
for Digital Performance in Sound)
Recordings and Ephemeral)
Recordings (Web IV))

14-CRB-0001-WR (2016-2020)

WRITTEN DIRECT TESTIMONY OF
BEN DOWNS, BRYAN BROADCASTING
(On behalf of the National Association of Broadcasters)

Introduction and Summary

1. My name is Ben Downs. I am the Vice President and General Manager of Bryan Broadcasting, Inc. ("Bryan Broadcasting"). In this role, I am responsible for managing nine radio stations in the College Station, Texas area as well as publishing outlets and interactive and social media in this region. I have been managing these stations for nearly 25 years. This testimony is based on my experience in the radio broadcasting industry, as well as information provided to me by other Bryan Broadcasting employees.

2. Bryan Broadcasting currently streams eight of its nine radio formats over the Internet as a service to its loyal listeners. Doing so, however, has always resulted in losses to the company. This is, in large part, because the high royalties that SoundExchange collects from us under the current rate structure exceed the revenue we are able to generate from streaming advertisements. That, combined with the cost of purchasing bandwidth and other overhead expenses, has resulted in significant losses to the company from its streaming operations. That situation does not appear to be changing. Thus, if royalties for streaming sound recordings

remain at their current rates, we will have to reconsider whether we can continue to use our successful core business (*i.e.*, over-the-air broadcasting) to support unprofitable streaming. If we cannot do so, this would be a loss for both our listeners and the record companies and artists, who gain promotional value from streaming exposure.

Background and Experience in Radio Broadcasting

3. I have over forty-five years of experience in the radio broadcasting industry, having gotten my start in 1968 as a weekend announcer at KXAR AM in Hope, Arkansas (at the age of fourteen). I held that position for three years while attending high school. While attending Texas A&M University, I worked at WTAW in College Station, Texas as an afternoon and evening announcer as well as a news reporter. Since graduating from Texas A&M in 1976, I have generally been associated with radio broadcasting in this area. I was briefly Vice President of a small group of stations located in East Texas and lived in that area for two years, from 1987-1989. During my time in Bryan/College Station, I was manager of KORA/KTAM from 1983 to 1987, returning to College Station to manage WTAW/KTSR in 1989.

4. I have held various leadership positions in the radio broadcasting industry on a local, state, and national level. I was first elected to the Board of Directors of the Texas Association of Broadcasters in 1999 by other broadcasters in the Texas radio industry. I then was elected to serve as the Chairman of the Texas Association of Broadcasters (TAB) in 2003, and was recently re-elected to this position, effective for 2015. I will be the first broadcaster to have the honor of being Chairman twice. In 2010, the TAB voted me "Broadcaster of the Year." I have served as chairman of the TAB's EAS (Emergency Alert System) Task Force. At the national level, I was elected to represent the state of Texas on the National Association of

Broadcasters (NAB) Board of Directors; I served in that capacity from 2008 to 2014. While serving on the NAB Board, I was chairman of the AM Revitalization Task Force.

5. I hold a Bachelor of Business Administration degree (Magna Cum Laude) from the Mays Business School at Texas A&M. Since graduation, I have continued to contribute to the Bryan-College Station community in numerous capacities. I serve as a member of the Better Business Bureau Board of Directors for the Brazos Valley, the Treasurer of the Research Valley Partnership (an area-wide economic development group) Board of Directors Executive Committee, and I recently served as the Chairman of the Board of the Bryan-College Station Chamber of Commerce from 2012-2014. In January 2014, I was honored in a tribute as a supporter of the Brazos Valley Museum, and in September, I was recognized as a Business Patron of the Arts by the Brazos Valley Arts Council. I also was recognized for my dedication to the Bryan-College Station region with a Jefferson Award from The American Institute for Public Service in 2012.

Bryan Broadcasting

6. Bryan Broadcasting owns and operates nine different radio formats in the Bryan-College Station, Texas region (five talk and four music formats), with the first one (WTAW) having received a broadcast license from the Federal Communications Commission (FCC) over 90 years ago, in 1922. WTAW was licensed to "A&M College of Texas" in 1919 under an experimental license as station 5YA.

7. Our stations provide listeners access to local information and entertainment and are consistently acknowledged for their commitment to their communities through service and outreach. It is worth noting that, despite industry trends, the stations employ a large number of

full and part-time employees, presently 68 people. Our separate program formats are described below.

a. **WTAW 1620 AM** is one of the oldest radio stations in America, broadcasting a News/Talk/Sports format in the Brazos Valley. WTAW serves as the flagship for Texas A&M Athletics, and its news department is also one of the most recognized in the state. We have won the "Best Newscast in Texas" from the Associated Press for the past three years. WTAW is the home of not only some of the most noted local broadcasters in the Brazos Valley but several nationally syndicated talents as well. Our website updates daily with local news gathered by our news department. As a part of our commitment to the local community, WTAW broadcasts A&M Consolidated High School sports and conducts live candidate forums in the weeks before state and local elections. The station promotes local events through no-charge announcements twice hourly. Selected pages from WTAW's website, <http://wtaw.com>, are attached as NAB Ex. 10.

b. **Zone 1150 AM (KZNE)** features local and national sports programming. The Zone is broadcast on 1150 AM and is home to Texas A&M sports talk and commentary in addition to national sports coverage through nationally syndicated shows from CBS Radio. Unlike most small market sports stations, KZNE features local talk shows from 8 a.m. to 6 p.m. daily. KZNE broadcasts the sports play-by-play of Bryan High School as well as several on-location local weekend sports programs. Selected pages from The Zone's website, <http://zone1150.com>, are attached as NAB Ex. 11.

c. **The Zone HD (KNDE-HD3)** is usually a simulcast of our KZNE AM 1150 station. However, we program it separately when there are sports event schedule conflicts and also for play-by-play of Texas A&M Olympic sports.

d. **Candy 95.1 FM (KNDE)**, on air for about a decade, prides itself on service and contact with its audience. It broadcasts a Contemporary Hits Radio format and boasts a number of successful local radio personalities that have helped grow the Candy 95 brand. Candy 95 has large online followings at candy95.com, on Facebook, and on Twitter. In keeping with the belief at Bryan Broadcasting that public service comes first, Candy 95 spends countless time producing and promoting numerous area charity events. In 2012, the National Association of Broadcasters awarded the station its Crystal Award to recognize Candy 95's commitment to serving the local community. This year, KNDE was one of five finalists for the prestigious Marconi Award. In addition to community guests who appear to promote their events, Candy 95's Street Team will often appear at area events (at no charge) to provide music and on-air mentions. Selected pages from Candy 95's website, <http://candy95.com/>, are attached as NAB Ex. 12.

e. **Peace 107:7 FM (KPWJ)** is a relatively new station in the Bryan-College Station area, going on-air in 2012. Peace 107 airs Contemporary Christian music and programming and is home to a roster of locally broadcast shows and local on-air talent. These include daily shows hosted by our on-air staff Brian Christopher (6-10 a.m.), Kat McMullen (11 a.m.-1 p.m.), and Jami Mayberry (2-6 p.m.). The station bills itself as uplifting and encouraging. It does not proselytize but rather shares stories of encouragement and blessing with its listeners. Peace 107 also promotes local events

through no-charge announcements hourly. Selected pages from Peace's website, <http://peace107.com>, are attached as NAB Ex. 13.

f. **KAGC 1510 AM Christian Family Radio** is a Christian Teaching/Talk station that centers on providing the Bryan-College Station region with a focus on family, faith, and talk. The weekly schedule at KAGC 1510 AM includes sports, news, and weather in addition to the worship related lineup. The Christian-based elements of Christian Family Radio's segments feature nationally syndicated shows, including Chuck Swindoll's Insight for Living, The Dave Ramsey Show, and Family Talk with Dr. James Dobson. The station also broadcasts local programming, including "Bonus Breakaway with Ben Stuart" (a daily segment from the non-denominational weekly Bible study on the campus of Texas A&M), periodic local weathercasts, and daily local news headlines aired during drive times. The station has a Polka show that is broadcast on Saturday and Sunday afternoons. This long standing program is in recognition of the earliest settlers in this area and their descendants who emigrated from the Czech Republic region of Europe. KAGC is a daytime station, licensed to operate only during daytime hours. Selected pages from KAGC's website, <http://kagc1510.com>, are attached as NAB Ex. 14.

g. **Navasota News 1550 AM (KWBC)**, located in Navasota, Texas, is a local news station that broadcasts local news and syndicated talk programming. There are only two employees at the station; both are news people. Navasota News also broadcasts Navasota high school sporting events to the surrounding community. Before its acquisition by Bryan Broadcasting, the station had failed financially and was dark. Selected pages from KWBC's website, <http://navasotanews.com>, are attached as NAB Ex. 15.

- h. **Rock Candy (KNDE-HD2)** broadcasts a rock format on an HD channel.

This station, launched in 2011, is a music-only format. Selected pages from Rock Candy's website, <http://aggielandsrock.com>, are attached as NAB Ex. 16.

- i. **Maverick 102.7 (KNDE-HD4)**, launched in August 2014, airs country

music aimed at younger audiences. In addition to airing country music, the station's programming includes daily morning, midday, and evening shows featuring local announcers. The station shares the news department with WTAW and broadcasts hourly local news in the morning as well as local public service announcements throughout the day. Selected pages from Maverick's website, <http://maverickradio.com>, are attached as NAB Ex. 17.

8. In addition to the nine active radio operations described above, Bryan

Broadcasting is in the process of preparing to launch three additional stations in the area: WTAW-FM 103.5 (Buffalo, Texas); KVMK-FM 100.9 (Wheelock, Texas); and KKEE-FM 103.1 (Centerville, Texas). The specific content to be broadcast from these stations has not yet been fully determined.

9. For five consecutive years from 2008 to 2012, and again in 2014, the Texas Association of Broadcasters has chosen Bryan Broadcasting as the recipient of the Bonner McLane Public Service Award, which recognizes a radio or television station's contributions and service to its local communities. WTAW and KNDE have been finalists for the National Crystal Award every year from 2010 to 2013. WTAW has received numerous awards from the Associated Press for reporting. The stations also have received special recognition for no-charge public service commercial donations by the Texas National Guard.

Streaming

10. WTAW was one of the first radio stations to be streamed and has been available online since the mid-1990s. Bryan Broadcasting streams most of its other radio stations as well. The streams can be accessed at www.bryanbroadcasting.com and at www.radioaggieland.com, through our Radio Aggieland mobile app, and through the individual station websites. It is my understanding that our streaming audience is but a tiny fraction of our broadcast audience.

Bryan Broadcasting's Difficulty in Making Streaming Profitable

11. Despite our continuing efforts to monetize our streaming, it has always been a money-losing proposition for Bryan Broadcasting. While we make each of our stations' programming available online as a service to our listeners, many of whom are college students, the advertiser community to which we sell simply does not value streaming the way that it values our broadcasting operations. There is an aphorism that compares "Analog Dollars and Digital Dimes," which reflects our experience. Our cost per thousand (CPM) prices for over-the-air ads vary across our broadcast stations, but streaming in a market our size is of little or no value to advertisers. This makes it difficult for us to make money from it.

12. To illustrate, we have an ad insertion agreement with our stream provider, under which the provider undertakes to sell streaming-specific ads for a fee to advertisers for any or all of our stations. Bryan Broadcasting receives [[]] of the revenues from that effort. This agreement generates revenues across all of our stations of less than [[]] per month, often much less. For the first eight months of 2014, total advertising revenues across all of our stations from streaming were about [[]] – an average of about [[]] per month for all stations combined. NAB Ex. 18. Other than this insignificant income, the only other streaming revenue of note that we receive is unrelated to our music stations. We receive [[]] per month for the

splash screen on our mobile streaming player, and [[]] per month for the pre-roll that is activated when accessing the stream through the WTAW and KZNE talk station websites. Although we have no technical way to limit the splash screen on our mobile app to a single station, the client (The Bank and Trust) bought the product for the WTAW talk show and news stream only.

13. The minimal income that our streaming has been able to generate and the lack of interest by advertisers in our streaming show how little advertisers value this medium, particularly for music stations. Local advertisers especially are uninterested in purchasing our streaming products. Streaming does not even have the same money-making ability as selling bumper stickers. For example, in July 2014 we were able to sell an ad on the back of our Maverick 102.7 bumper sticker with our initial order of 6000 stickers for [[]].

14. Apart from the few inserted ads discussed above, the ads on our streams are identical to those that Bryan Broadcasting runs over the air with the exception of national advertising, which we cover with public service announcements so as to avoid any issue with the American Federation of Television and Radio Artists ("AFTRA") or its successor (now "SAG-AFTRA"). We do not receive any extra money for running these simulcast ads on our streams. Currently, our local advertisers are included in our on-line stream. If we were to remove their commercials from the stream unless they paid an additional charge, we would need to justify that increase in advertising cost to our advertisers. In my experience, unless it was an insignificant amount (like 50 cents or a dollar) they would simply ask that we not include their commercials in the stream. In fact, recently we received a rate request from an advertising agency that specifically requested that we treat streaming ads as "value added" items for which the advertiser

would not be charged. "Valued-added" is ad agency-speak for something that should be thrown in at no charge because the agency does not believe it has meaningful value.

15. We have been unable to interest advertisers in even our most listened-to streaming stations. Our most listened-to streaming station, WTAW AM, had [] average concurrent listeners (ACL) and [] aggregate tuning hours (ATH) during the 12-month period from October 1, 2013 to September 29, 2014. Our most listened-to music formatted station, Candy 95, had only [] average concurrent listeners (ACL) and [] aggregate tuning hours (ATH) during that same 12-month period. As mentioned above, it is my understanding that our streaming audience is but a tiny fraction of our broadcast audience. As discussed above, advertisers view streaming ads as something they want us to throw in for free when they purchase broadcast ads for any of our stations. To me, this demonstrates that, at least for markets and streaming audiences of our size, streaming ads have no intrinsic value to advertisers. Based on my experience, I am confident that even if we were able to grow our streaming audience to 100-200 average concurrent listeners, advertisers would still be unwilling to purchase streaming ads from us.

16. Our difficulty in making our streaming operations a viable standalone business is compounded by the linear nature of the royalties that we are required to pay to SoundExchange to perform sound recordings in our streamed programming. These royalties increase by a fixed amount for every additional listener to a sound recording performance. We are in a Catch-22. In order to even begin to interest advertisers in our streaming audience, we need to increase our listener base significantly. But if we become successful in doing that, our streaming royalties and other costs would increase dramatically and in direct proportion to that increased

listenership. Based on our understanding of our markets, our revenues would never catch up to the costs.

17. By way of example, our streaming ad income from our stream provider is measured by the cost-per-thousand (CPM), meaning the amount our Internet streaming provider receives for every 1000 ad impressions. An ad impression is a single instance of listener exposure to a streamed advertisement. Our provider's CPM for streaming on a weighted average for the January-August 2014 period was [] []. NAB Ex. 18. We receive [] [] of that amount, which is equivalent to [] [] CPM, typically for 1 minute ads. NAB Ex. 18. The streaming royalties paid to SoundExchange at the 2014 rate of 0.23¢ per performance, alone, is equivalent to \$2.30 CPM.

18. The lack of demand limits the number of ads our stream provider can sell on our streams. Even if the provider could sell the same number of ads as there are songs in a period of programming, which they cannot, we would still come out way behind. For each 1000 listeners who hear ads, we receive only [] []. During that same period, because there are more songs than ads, we would have to pay SoundExchange more than 1000 times \$.0023, or more than \$23.00. Further, we have not seen increases in demand for ad CPM, and do not expect increases in the foreseeable future. If we succeed in attracting more listeners, our costs increase at a faster pace than our revenues. The increase in rates scheduled to take effect in 2015 will only worsen this already untenable situation.

19. The linear increase in streaming royalties under the present rate structure compares very unfavorably to broadcasting, where our transmission costs are fixed and each incremental listener costs us nothing to serve. In that medium, the more successful we are, the more revenue we generate. With streaming, the opposite is true – the more listeners we attract,

the more it costs us in streaming fees and bandwidth charges. The additional costs, however, are not accompanied by a commensurate increase in revenues. For example, while our streaming revenues have remained insignificant over the past three years despite having added additional streaming stations, our SoundExchange royalties have increased from approximately [[]] in 2011, to about [[]] in 2012, to over [[]] in 2013. NAB Ex. 19. We generated streaming revenues of only about [[]] in 2012, [[]] in 2013, and [[]] in the first eight months of 2014. A system that imposes fee increases that far exceed any revenue growth is unsustainable.

20. So far in 2014, we have lost over [[]] on our overall streaming operations. Our total streaming revenue through August – for all of our stations combined (both talk and music formats) – is [[]]. More specifically, from January through August of this year we earned [[]] for our phone app splash screen and [[]] from streaming ad insertions – but as noted above the splash screen was actually purchased for use with a non-music station, WTAW. On the other hand, we incurred Internet bandwidth fees of [[]] (through July) (NAB Ex. 20), stream player fees of [[]] (through August) (NAB Ex. 21), and streaming royalties to SoundExchange of [[]] (through August) (NAB Ex. 19). Of course, a significant portion of our bandwidth and player expenses is associated with streaming of our non-music formats, but our SoundExchange fees are almost entirely attributable to the streaming of our music formats. Even setting aside all the other costs involved (such as sales commissions and general overhead expenses), and any allocations of our programming costs, our music streaming operations resulted in a significant loss for the company. With the current SoundExchange rate structure our sound recording performance fees alone already far exceed

our streaming revenues. If our audience grows, our losses will only increase unless those rates are reduced significantly from their current level.

21. The current rate structure, with its automatic annual increases, has already caused our streaming fees to increase even where the number of streamed performances has decreased from previous years. For example, in the following illustration based on KNDE-FM (Candy 95) and KNDE-HD2 (Rock Candy) we showed a [[]] decrease in listeners yet fees increased [[]]. For the months of January 2011 through August 2011, those stations' performances totaled [[]]. That number decreased to [[]] for the same eight month period in 2014. But the royalty paid for those performances increased from [[]] to [[]], an increase of [[]]. The increase for 2015 (to 0.25¢) will be 47% above 2011's rates, further compounding this problem.

22. The location of our audience base presents another catch-22. Eighty percent of our ads currently are from local businesses. As I have said, we cannot even convince those advertisers that our local streaming audience has any value. Our local listeners are the same ones who can listen to our radio stations over the air. With respect to the portion of our streaming audience that is non-local, which is a minority of our listeners, our advertisers are even less interested in reaching that audience. Why would someone from Chicago, for example, be interested in a special at a local restaurant? Yet I am required to pay SoundExchange royalties for both local and non-local listeners who I simply cannot monetize.

23. While we would like to continue offering streaming service to our listeners, we do not believe that it is essential to our existence. Like leather seats in a car, it is nice to have, but not necessary. If streaming royalties are not reduced, our losses will only continue to increase. We will have to consider dropping our streaming services and dedicating those resources to our

core business – *i.e.*, over-the-air broadcasting. Based on my review of our streaming financials in connection with preparing this testimony, I have concluded that our company should seriously consider ceasing our streaming operations, as we may already have reached the point where the costs associated with streaming, particularly for our music formatted stations that generate unsupportable SoundExchange fees, is too expensive to justify.

**Bryan Broadcasting Stations Succeed for
Reasons Other than Streaming Recorded Music**

24. The success of Bryan Broadcasting's stations, including its music formatted stations, is the result of their close ties with the local community that come from our staff's community involvement, listener loyalty, and on-air programming. We have found, after more than a decade of streaming experience, that streaming contributes very little, if anything, to our success.

25. There are a number of elements that contribute to the success of our radio stations, most of which have little or nothing to do with music content. Recorded music has almost nothing to do with the success of our four news/talk/sports stations, as we air virtually no featured music on them (it is worth noting, however, that we still must pay SoundExchange a minimum \$500 annual fee to stream these stations). Rather, these stations broadcast news, talk, teaching, and sports programming, including live sporting events. Our local sports coverage is very popular. When we broadcast Texas A&M football on WTAW, for example, we often reach on-line listening levels that far exceed those of our music formatted stations.

26. The key to the success of our music stations is their unique programming. Streaming our music stations is nice, but a song by Katy Perry sounds the same in LA as she does in College Station, Texas. The difference is presentation and what is between the songs. If

there were no unique entertainment proposition to the listener, they would not seek us out just because we are on-line. On-line music-only choices are legion. Music stations with unique College Station content are rare. This is illustrated, for example, by the spikes in Candy 95's listener volume that occur on each weekday when our most popular daily shows are broadcast, in contrast to the low level of activity for that station on weekends.

27. One of the most critical ingredients to the popularity of our stations is the people who work for them. Making the investment to have a full-time, local staff is an important driver of the success of our stations and forming listener loyalty with our brands. I believe that a full-time staff is vital to elevating our stations' identities in the marketplace. People crave friendship. A sincere voice talking about local "things" is often considered a friend who is never met. My background is programming. I sometimes will be a guest on the air of the stations because, as I tell my staff, "I didn't get into this business to read spreadsheets all day." My longevity in the market combined with these on-air appearances mean that I get to shake hands with people I've never met who believe they personally know me through on-air contact. People consider me a friend because we've laughed about some absurdity of life on the air. A jukebox never engenders that sort of connection or friendship. For that, you need people. Again: Katy Perry's music sounds the same in LA as it does back home, but in LA, they aren't talking about the new restaurant on University Drive or the excitement of the Christmas Parade on Sunday.

28. An important part of our staff – and people who contribute immensely to the success of our stations and enhance their connections with the surrounding community – is our on-air talent. These are the people that listeners keep tuning in to spend time with and with whom they form loyalties. For example, Candy 95 has morning, mid-day, afternoon, and evening local shows. The host of Candy 95's afternoon show, airing from 2-6 p.m. weekdays,

Adam Knight, has been the host for over ten years. Candy 95's morning show has been hosted by Tucker "Frito" Young for seven years. His show actually makes a point to emphasize that relational talk programming, rather than music, is its focal point, using the slogan "less music more talk." The show maintains dominance in the market by connecting to the audience every day via emails, texts, and phone calls. Receiving hundreds of text messages from listeners in a single morning is common.

29. We expect our personnel to connect with the communities that our stations serve and to promote our stations throughout those communities. To that end, our employees engage in a variety of activities to strengthen those community ties, including participating in charity events and performing volunteer work. For example, each year, KNDE and WTAW sponsor the Christmas Angels toy drive, which provides toys and clothing to 700 needy area children. Katy Dempsey raises money for the local Special Olympics athletes with a touch football tournament. Tucker Young adopts and fosters pets from the Humane Society; regular guests on his morning show. Mary Hatcher raises money for cancer research. Scott DeLucia is working to rebuild the Bryan Downtown area and to encourage local artists to locate there. Everybody works on fundraising for area charities and speaking to classes. We also send our staff to major community and fundraising events. For example, three of our staff recently attended a ribbon cutting ceremony for a local bank, which donated \$100,000 to the United Way. It was on the news the next morning. This connection to the community means that members of that community are comfortable calling us when they need assistance.

30. Another important ingredient of our stations – including our music-formatted stations – is the news, local weather, and other community information that they broadcast. It is valuable for our stations to have people in the local market talking about stories we covered and

the topics we brought forward. Our music stations, Candy 95, Maverick, and Peace, feature non-music related content that enhances listener loyalty. For example, Peace107 will often open the lines to callers on a topic like “the best advice Mother ever gave you.” One of Candy 95’s secret weapons is to solicit listener opinion about national – and especially local – issues (would you eat what the new lunchroom standards for kids mandates?). Maverick, being new, is still developing its relationship with listeners by taking on-air listener phone calls for requests, comments, and exploring what attracted listeners to the station. All three of our broadcast music stations feature local public service announcements every hour, provide morning local news updates, and make traffic announcements whenever traffic flow is slowed.

31. Our stations also broadcast many special features that enable our listeners to interact with us and thus further increase our ties with them. For example, we announce contests over the air that listeners can enter online, by calling in, or by texting. One example of such contests is a contest we recently ran on Candy 95, where we gave away movie tickets to the Twilight marathon to the 95th texter to respond. We received 4,000 texts in response to this contest within less than fifteen minutes, showing how engaged our listeners are in interacting with us. The on-air staff at Candy 95, Maverick, and Peace frequently take calls and invite discussion of topics of local interest.

32. In addition to our broadcast programming and on-air talent, the content that we display on our websites is another important tool in increasing our brand loyalty. For example, Peace107.com includes postings of upcoming community events of interest to listeners, allows listeners to submit calendar events, includes uplifting blog posts and daily scripture readings, as well as a link to an order form for obtaining free copies of our publication “Peace Magazine.” Candy 95’s website, Candy95.com, includes a web page that provides information about various

contests that listeners can enter on-line and/or listen for. Maverickradio.com features local news as well as music and local performance venue information. Our non-music stations post extensive news, sports, weather, and community interest information. The stations share a common "My Photo" site. Whenever we're involved in a large event, we take many photos and upload them onto this site and encourage attendees to download them for free.

33. We further strengthen our listeners' connections with many of our on-air personalities by providing more information about them on our station web pages. The Candy 95 web page, candy95.com, contains links to web pages for our on-air staff and for our Morning Candy show and its co-hosts, Frito (Tucker Young) and Katy. For example, Adam Knight posts the answers and winners of his daily "Road Warrior Trivia" contest on his web page. Peace107.com contains self-descriptions of Peace 107's on-air staff as well as frequent postings by the station's DJs, such as short articles, recipes, and life lessons. Our recently-launched Maverick 102.7 website, maverickradio.com, includes web pages featuring our show "The Morning Mavericks with Drake & Mel" and our afternoon show "Drew Williams," along with a blog site with postings by Drew.

34. We also maintain Facebook and Twitter pages for many of our stations and include links to those pages on our station websites so that listeners can more easily find them and communicate with us. For example, Candy 95's website has links to its Facebook page, Twitter page, and You Tube page, as well as a link to the Facebook page for the Morning Candy show. The level of activity on these media fluctuates from week to week, but is always significant. As of October 2, 2014, Candy 95 had generated over 15,000 Facebook "Likes" and had a weekly reach of over 37,000. Interest generated by our Facebook posts involving issues of local interest far exceeds interest in our postings related to music. For example, some recent

Facebook postings by the station show that while new music posts reached about 1500 Facebook users (NAB Ex. 22), the station's posts about lost dogs have reached more than 10 times that amount – reaching over 15,000, or even 80,000. (NAB Ex. 23) Candy 95 currently has over 4,600 Twitter followers. As discussed above, our stations also make extensive use of texting to strengthen the bond between the station and its listeners. Candy 95 consistently receives thousands of texts each month.

Our Stations Promote Artists

35. Our music formatted stations are recognized as a means for artists to increase their exposure and become better known. For example, Maverick is a very new station but already has been sought out by musicians who are performing locally. Our studio is not even completely finished, yet last week, I watched an up and coming group put all five members, guitars, and a drum kit in the room to provide a demo to the audience. Radio is a particular friend to Country Music. Country artists, whether charted or not, recognize the promotional value that over-the-air radio provides – Maverick 102.7 has only been on the air for a couple of months, and, so far, these artists have visited or are scheduled to visit our small town station: Roger Creager, Aaron Watson, Josh Abbott, William Clark Green, Granger Smith, Kyle Park, Wade Bowen, Sean McConnell, JB and the Moonshine Band, Sam Riggs, Jason Eady, and Texas Tenors. These artists could simply put their music on YouTube and be in the digital, streaming world. But they choose to make appearances on our station and its stream.

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:

Determination of Royalty Rates
for Digital Performance in Sound
Recordings and Ephemeral
Recordings (Web IV)

14-CRB-0001-WR (2016-2020)

DECLARATION OF BEN DOWNS

I, Ben Downs, declare under penalty of perjury under the laws of the United States that the matters set forth in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information and belief.

Executed on October 6, 2014.



Ben Downs

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:)

Determination of Royalty Rates)
for Digital Performance in Sound)
Recordings and Ephemeral)
Recordings (Web IV))

14-CRB-0001-WR (2016-2020)

WRITTEN DIRECT TESTIMONY OF
ROBERT FRANCIS KOCAC (BUZZ KNIGHT)
(On behalf of the National Association of Broadcasters)

Summary

1. My name is Robert Francis Kocac. I have spent over thirty-five years in the radio industry, beginning as a disc jockey at my college radio stations. Since early in my career, I have been known professionally as Buzz Knight; that is the name by which most people in the industry know me. For the last seven years, I have held the position of Vice President of Program Development at Greater Media, Inc., where I have overall responsibility for the content broadcast and streamed by twenty-one FCC-licensed full power AM and FM radio stations with varying formats. My statement below is based on my own extensive experience in the radio industry.

2. Most successful radio stations, including most music-formatted stations, owe their success to elements other than music. I believe this is important to understand in the context of setting royalty rates for streaming. By their nature, commercial radio stations strive to attract and retain listeners and, thus, advertisers. Successful radio stations must bring something unique and different in order to stand out. In my experience, the key is to build an individual brand

identity for each station and to integrate that station into its local community so that it becomes prominent and well-known. That effort requires: a substantial commitment to memorable on-air talent, particularly in the morning drive but also at other times in the day; consistent and prominent station involvement in the community, such as at charitable functions; informative and interesting on-air coverage of local issues and events; and active promotion of the station's brand, including through social media. Over time, listeners develop a sense of trust in our on-air personalities and in the stations themselves. It is through these efforts that we develop loyal listener bases, both for our over-the-air broadcasts and our streams of those broadcasts. In contrast, consumers can turn to a wide variety of sources and when they want to hear nothing but music. Likewise, the music that a radio station plays is not exclusive to that station, and any musical niche that is developed can be readily copied by competitors. Thus, in order to succeed at a high level, our stations must do much more than play music.

3. For as long as I have been in the business, record labels have sought to leverage our stations' relationships with their listeners in order to promote their artists and recordings. Record label representatives and artists actively seek spins on our stations, including their streams, through personal visits, calls, emails, provision of recordings, and participation in promotions, including artist visits and giveaways. Just as important as winning spins, record labels and artists also seek the endorsement of songs and artists by our on-air talent, whose opinions and recommendations listeners trust.

Professional Background

4. During my long career in radio, I have served as on-air personality, program director, operations manager, and programming executive at numerous radio stations in diverse markets around the country.

5. I graduated from the University of Dayton in 1978 with a bachelor's degree in communications. During college, I worked on-air at two on-campus radio stations. After graduation, I worked briefly at WKQQ in Lexington, Kentucky, and then moved to WRKI in Connecticut, where I worked from 1978 to 1987. At WRKI, I started on-air and eventually also served as assistant program director, program director, and then operations manager of the station, along with an AM sister station, WINE.

6. From 1984 to 1987, I also worked part time at WNEW FM in New York City as weekend on-air talent. WNEW was a legendary New York radio station that helped set the trends for rock music radio during the 1970s and 1980s. The station was very engaged in the local community and, among many other events, ran major fundraisers to benefit food banks, sponsored and organized concerts in the New York area, and broadcast live music from venues like the Hard Rock Café. The station's ethos embodied not just the music on its airwaves, but the culture and spirit of New York City in and around that music.

7. From 1987 to 1990, I worked at WLVQ- QFM96 in Columbus, Ohio. I started with an on-air position and also served as program director, but ultimately chose to concentrate my efforts on the program director position.

8. From 1990 to 1992, I worked at WNOR, a Saga Broadcasting station in Norfolk, Virginia, as program director. Then, in 1992, I moved to WZLX in Boston, Massachusetts. I was with WZLX until 2002. During that time I programmed WZLX. I also served as the classic

rock format captain for WZLX's parent company and helped with programming projects for stations outside of Boston.

9. In 2002, I joined Greater Media as program director of WMGK in Philadelphia, Pennsylvania. Later, I also began programming WROR in Boston, another Greater Media station. My role evolved to include advising rock and classic rock stations throughout the Greater Media portfolio on programming. I was named Vice President of Program Development at Greater Media on January 1, 2007; I have held that position in the company ever since.

10. In my current position, I supervise programming for all of the Greater Media stations, including streamed content. I work with the company's CEO and local teams, including the program director and general manager of each station, to plan, coordinate, and market their programming in a way that best serves the interests of their audiences, clients, and local communities. I spend most of my time working with the stations in each individual market to monitor performance and, when appropriate, help strengthen each station's brand and ratings performance.

11. I am actively involved in several industry organizations, including the National Association of Broadcasters' Committee on Local Radio Audience Measurement, the Arbitron (Now Nielsen) Radio Advisory Council, and the Council for Research Excellence (including Committees on Local Measurement, Social Media and Education). I was named among "Best Programmers" by Radio Ink Magazine in 2007 and 2010.

Background of Greater Media

12. Greater Media presently owns and operates twenty-one AM and FM radio stations in the Boston, Charlotte, Detroit, Philadelphia, and New Jersey markets. In addition to its radio stations, Greater Media also operates a group of weekly newspapers in New Jersey and owns several telecommunications towers throughout the United States. Greater Media was founded in

1956 by two Yale classmates and is a privately held company with its headquarters in Braintree, Massachusetts. From the beginning, Greater Media and its operating companies have stressed the autonomy of local management, dedication to local community service, and leadership in developing and adapting to new technology and services to improve the overall perception of the industry.

13. Greater Media currently operates the following radio stations:

<u>Market</u>	<u>Station</u>	<u>Format</u>
Boston	Magic 106.7	Adult Contemporary
Boston	105.7 WROR	Classic Hits
Boston	102.5 WKLB-FM	Country
Boston	Hot 96.9	Rhythmic AC
Boston	Radio 92.9	Alt. Rock
Charlotte	WBT 1100 AM / 99.3 FM	News-Talk
Charlotte	107.9 The Link	Personality Hot AC
Detroit	94.7 WCSX	Classic Rock
Detroit	Detroit Sports 105.1 FM	Sports
Detroit	101.1 WRIF	Rock
Philadelphia	102.9 WMGK	Classic Rock
Philadelphia	93.3 WMMR	Rock
Philadelphia	95.7 WBEN-FM	Adult Hits
Philadelphia	97.5 The Fanatic	Sports
New Jersey	98.3 WMGQ	Adult Contemporary
New Jersey	1450 WCTC	News Talk
New Jersey	105.5 WDHA	Rock

New Jersey	1250 AM WMTR	Classic Oldies
New Jersey	95.9 WRAT	Rock
New Jersey	100.1 WJRZ	Classic Hits

Greater Media streams all but one of these stations over the Internet. We have chosen not to stream WMTR, a New Jersey oldies AM station. The streams for Greater Media's stations can be accessed through the stations' websites, iHeart Radio, or station apps available for iPhones and Android phones.

**Local Programming and Presence Is Key to
Traditional Radio Stations' Continued Success.**

14. Five of our twenty-one stations, including WBT in Charlotte, which is licensed and broadcasts on both the AM and FM bands, are news-talk or sports-formatted stations that broadcast essentially no music. The remaining sixteen Greater Media stations are varieties of what would traditionally be considered music-formatted stations. Even as to these stations, however, it is my view that music is not the primary driver of success. That is true both with respect to the broadcasts and the associated streams.

15. For as long as I have been affiliated with Greater Media, we have always focused on integrating our stations into the local community. This is more challenging, risky, and costly than simply playing music that is widely available elsewhere. In an article I wrote for Radio Ink on May 21, 2012, I suggested that radio industry professionals should "Watch for local angles to serve topical cause related needs that help your communities and expose your radio station at the same time. Radio plays a vital role in serving our communities. If you follow your heart, you'll do the correct thing for your brand and your market." I continue to believe that today.

16. One critical component of our stations that is both local and exclusive is our on-air personalities. While morning drive is generally considered to be the most important day part

for personalities, in my view, they are important in building a successful station throughout the day. Our on-air personalities consistently wear a lot of hats; they are curators, they are concierges, and they are companions and friends. We feature personalities who have built their audiences over the course of decades on the air. For example, Nancy Quill and David Allen Boucher have been on the air at Magic 106.7 in Boston since the station began broadcasting more than thirty years ago; neither is currently on the morning drive. The Loren and Wally Morning Show has been broadcast on WROR in Boston for over twenty-five years. On 107.9 WLNK in Charlotte, we have personalities throughout the day, starting with the Bob & Sheri Morning Show, followed by mid-days with Kelly McKay, followed by Matt & Ramona in the afternoon, and then Anthony Michaels in the evening. Our Detroit Classic Rock station, WCSX, and our New Jersey Rock station, WRAT, have had most of the same on-air talent for years; thus, a relationship has been built with listeners. Our rock station WRIF has rocked Detroit since 1971 as a radio brand with live and connected personalities, many of whom have a long legacy with the market. Because of this wealth of on-air talent, which is generally exclusive to us, listeners have a reason to listen to our stations

17. Local personalities have always been important in radio. The growth of social media has, if anything, increased that importance, particularly in major markets. When I began in radio, the opportunities for listeners to interact personally with on-air talent were limited primarily to call-ins and local appearances; the relationship with the audience therefore had to be developed primarily through the one-way broadcast transmission. Now, communication runs both ways, with listeners interacting directly with our on-air talent through Twitter, Facebook, Instagram, and other social media. This facilitates building relationships with individual listeners and, even more importantly, a community of listeners to a station or particular program.

18. Even with the development of social media, our General Managers recognize the continuing need for their stations and their on-air personalities to be active and visible in their communities; tweeting is not enough. We nurture and promote our local connection through charity drives, public concerts, and other events such as: the Preston & Steve Campout for Hunger in Philadelphia, which raises tens of thousands of dollars and tons of food to support the local charity Philabundance; the Radio 92.9 Earthfest in Boston, a free live concert held at the Boston Hatch Shell each May to promote environmental awareness and earth-friendly products and services; John DeBella's Veterans Radiothon at WMGK in Philadelphia, which, over the last eight years, has raised well over a half a million dollars for veterans' charities (earning John in 2012 "Veteran Champion of the Year" from the Philadelphia Small Business Association); WCSX in Detroit and the Stone Soup Project, where listeners and local companies donate to build a car for charity; and WBT and WLNK in Charlotte creating Holiday on Ice and an outdoor skating rink for listeners in the heart of the city.

19. Of course, there are costs to a local, personality-driven approach. Talent can be costly, particularly when it has developed a large following in a market. Development of new talent, or the introduction of talent to a new market, can require a substantial investment of time and marketing expense. We are always seeking to build our bench strength so that a new personality can, for example, move from overnight to a more prominent day spot. We are also looking outside for new talent. Even with all of this investment, there is no guarantee of success. For every Loren & Wally Morning Show, there are legions of failures – far too many to count. And every one of those failures has nonetheless incurred substantial expense for the station's owners; except perhaps in very small markets, nothing gets on the air without analysis, testing, refinement, and promotion, all of which cost money.

20. Being part of the community also requires providing information. While we have five stations that are entirely dedicated to news, talk, or sports, the vast majority of our stations provide regular updates on local news, traffic, sports, and weather information, at least during the morning drive and, in some cases, during other day parts. In some markets, stations have individuals dedicated to providing these services; in other markets, these resources are generally shared but can be provided by individual stations when needed. Our listeners expect to receive this type of information, and it is part of the basic value package that attracts listeners to our stations.

21. While news, talk, sports, and weather information are always important, they assume particular (and sometimes overriding) significance when there are major events in the community. Depending on the particular situation, listeners may turn to us to receive essential information, to share their concerns, to feel a sense of community, or to vent their frustration. For example, our station WRAT in New Jersey became a primary source of news during the Hurricane Sandy crisis; I am proud to say that station management and staff demonstrated their responsibility to the community through their excellent reporting, winning an award for their news coverage of the crisis. In Boston, our cluster of stations provided extensive coverage and news alerts in connection with the Boston Marathon bombing and the citywide lockdown and manhunt that followed. This was accomplished with our stations' own resources and also in partnership with television station WCVB. In these types of situations, and others like them, it is particularly important that listeners interact with or receive information from on-air personalities with whom they already have a connection. We are also there with our listeners to celebrate happier times, such as sports championships; all of this is possible because we are primarily local broadcasters.

22. Another way that we increase the interaction with our audience is through contests and other promotions. Contests and promotions have been an integral element of local radio for as long as I have been in the business. A popular contest or promotion can draw tremendous attention to a station, build a sense of community and connection, and increase ratings. WMMR in Philadelphia has frequently done an on air promotion supported by direct mail marketing called "Grand Band," which results in a listener winning \$1000 after hearing three songs from a station core artist.

23. Our stations' websites are also an important way that we keep in touch with our audience. Station websites, which are accessible directly or through our general company website, www.greatermedia.com, display information about station personalities and programs, news and entertainment items that may be of interest to our listeners, information about current promotions and contests, photos of gatherings and events, and tabs that allow listeners to see what songs have been played recently, in addition to advertisements. These sites, along with our Facebook pages, are important resources for our listeners, as well as serving as a portal to our stream.

24. Obviously, our radio stations compete most directly with the other stations in their local markets. But our local presence is also an asset when listeners are deciding what to listen to over the Internet. We can leverage our local talent, connections, and engagement in each of our marketplaces to provide a complete service to our listeners and customers that goes beyond just providing a collection of songs. For completeness, I should note that we have had two stations that are atypical for us in that the programming is almost all music. On one of these stations, Adult Alternative Rock station Radio 92.9 in Boston, we are developing a new sound and featuring more personality. The station personalities include Amy Brooks, who is featured prominently on the station's website, and Paul Jarvis (known as "Jarvis"), who, in addition to

serving as Assistant Program Director, also hosts morning drive on the station. Radio 92.9 also hosts and sponsors many local concerts, festivals, and other events in the community.

25. Our variety hits station 95.7 BEN FM in Philadelphia has a similar model with Marilyn Russell hosting the morning show and Rich Desisto (Assistant Program Director) and Kristen Hermann hosting the remainder of the day. Marilyn also does a regular community feature called "Woman of the Week" shining the spotlight on influential women from around Philadelphia.

26. About two years ago, I was interviewed by allaccess.com. In connection with a question about how radio had changed over the last few years, in particular with the adoption of the "people meter," I noted:

At the beginning and still to this day, I come away with the feeling that as much as technology has changed things, it all still comes back to great brand management and a meticulous attention to detail in managing those brands. As much as the [portable people meter] changed certain things that required an adaptation in your thought process, in many respects very little has change[d]. It's still about things that make great radio tick – great content from great personalities who have a great understanding of the market. That's the localism that's really important is the ability to always build your programming to the point where your listeners feel that if they miss a day from your station, they feel like they've missed a lot.

I continue to believe that, as I stated in the interview, the key to success in radio is to make your listeners feel that, if they miss a day at your station, they have missed out on something. Music alone cannot inspire that feeling. When I started in the radio business, people had their collections of vinyl records, which subsequently migrated to cassettes, CDs, and then MP3s. Now, if people want to hear a particular song, they can either go to their iTunes collection or go to Spotify or some other interactive service. But we cannot give people that "I don't want to miss that" feeling with respect to music, because we do not have music exclusivity, and it is

readily available from many other sources. Instead, we create that feeling by the content we create and the relationships that we build with our listeners.

Record Companies Depend on Local Radio Play To Promote Their Music.

27. Throughout my career, it has been clear that record companies rely on radio stations to promote and sell new music. Today, record companies are still highly invested in increasing spins or air time for their artists on our radio stations, including the station streams.

28. As I discussed above, neither Greater Media's stations nor any other radio stations can offer truly unique music programming, because the same songs by the same artists are available not only to all of our direct radio competitors but also through innumerable other sources. One thing we can do, however, is to present a better musical experience for the listener through a combination of research and our own knowledge and experience in programming. We spend a significant amount of time and money to provide a curated musical experience for our listeners. Many of our on-air personalities are known for their expertise in particular musical genres and can guide and aid listeners in their enjoyment of music. Nancy Quill, for example, our midday host at Magic 106.7 in Boston, has a degree in music education to go along with her thirty years of experience in radio broadcasting. Pierre Robert, our mid-day personality from WMMR, has had a thirty-year friendship with Jon Bon Jovi, which has included in-studio visits, acoustic performances, numerous interviews, and shout outs from on stage during Philly concert appearances. Jon Bon Jovi even recently asked Pierre to write the liner notes for his greatest hits box set, and he had Pierre host on stage a storyteller-like performance with full band for a private concert experience for one thousand of our listeners. WMMR was allowed to broadcast the hour long event in afternoon drive. The credibility of our on-air talent and their relationship with their

audience – in many cases a relationship developed over the course of many years – are invaluable to the record labels in promoting music sales.

29. Radio stations are important outlets through which record companies can introduce new artists and songs to prospective record purchasers, and where repeated play can propel a song to hit status. Record companies understand that radio is still vital to music discovery and engagement, and treat it as such. Never once has a label representative ever said to me “please don’t play my song on the air – it might keep someone from buying it.” To the contrary, they have always wanted airplay to gain sales. And, to be clear, since we started streaming, no record company representative or artist has ever indicated any aversion to being on our streams. The content on the stream is the same as it is on the broadcast, and the promotional effect should be no different. In fact, the stream has an added benefit in that, if accessed through our website or the app, a listener can readily identify a song that we are playing that he or she may wish to purchase. We also employ a feature in the majority of our markets called Tag Station, which enhances the in car listening experience with something called “Artist Experience,” which displays the artist’s name, song title, and album art for the recording being performed.

30. Record companies encourage radio stations like ours to consider playing their songs by offering prizes that radio stations use in on-air promotions. They also regularly offer backstage passes, autographed merchandise, and on-air interviews with their stars to help promote their product on-air.

31. Record companies also drive spins through direct asks to the station personnel, particularly program directors and music directors. Local and national label representatives, independent promoters, and artist representatives will personally visit our stations to push specific recordings or artists, lobbying us to add a song, increase spins, or keep a song in the

rotation because “it’s not done yet.” These visits often occur on a weekly basis; some stations have to limit the hours in which these visits will be accepted. It is also very common for record company representatives to email station personnel statistics linking the number of plays a certain song or artist has received on that station with record sales and downloads; even though I am no longer directly programming a particular station, I receive these emails constantly to this day. In addition to these direct efforts, labels will advertise extensively in trade publications such as FMQB (Friday Morning Quarterback) in order to publicize airplay and encourage more airplay. None of this massive effort would make sense unless the record labels believed – as I believe – that radio spins promote sales of recorded music.

Before the
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In The Matter Of:)

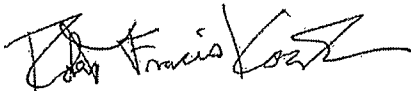
Determination of Royalty Rates)
for Digital Performance in Sound)
Recordings and Ephemeral)
Recordings (Web IV))

14-CRB-0001-WR (2016-2020)

DECLARATION OF ROBERT FRANCIS KOCAK

I, Robert Francis Kocak, declare under penalty of perjury that the matters set forth in my
Written Direct Testimony in the above-captioned proceeding are true and correct to the best of
my knowledge, information and belief.

Executed this 3rd day of October 2014 at Boston, Massachusetts.



Robert Francis Kocak

Before the
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LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:)

Determination of Royalty Rates)
for Digital Performance in Sound)
Recordings and Ephemeral)
Recordings (Web IV))

14-CRB-0001-WR (2016-2020)

WRITTEN DIRECT TESTIMONY OF
JULIE KOEHN
(On behalf of the National Association of Broadcasters)

INTRODUCTION

1. My name is Julie Koehn. I am the President and General Manager of Lenawee Broadcasting Company, the licensee of WLEN Radio, in Adrian, Michigan. I have held that position since 1990.

2. I offer this testimony to discuss why radio broadcasters and the programming they transmit are so important to the communities they serve. At any moment, we may be charged with keeping our community and the public at large safe in storms and power outages. At any moment, we may be charged with broadcasting an Amber Alert to help find a lost child, or helping find an adult who wanders off from a care facility. At any moment, we may be charged with broadcasting critical information regarding a local or national emergency.

3. I discuss below the ways in which WLEN fulfills this important role in the Lenawee County, Michigan community by providing local news, political coverage, weather, and community information, keeping our citizens safe during storms and power outages, providing tens of thousands of public service announcements each year, volunteering for various

causes, and supporting fundraising events. We also play music, but that is not the primary reason people listen to us, and it is not what makes us unique or important in the lives of the people in our community.

4. WLEN would like to simulcast its broadcast programming over the Internet in order to serve Lenawee County even more effectively, but we do not. Other than local sporting events, political debates, and government meetings of community interest, we do not stream. Our main reason for this is that we would be required to pay royalties to SoundExchange for the least unique part of our programming, and these royalties are much too variable and unpredictable to be able to design a stable business plan for streaming.

PROFESSIONAL BACKGROUND

5. I began my broadcasting career in 1985 after graduating from Michigan State University with a Bachelor of Science degree in both industrial and labor relations and political science. I have served as President of Lenawee Broadcasting Company for the past 24 years.

6. I currently serve on the Radio Board of Directors for the National Association of Broadcasters ("NAB"). I also have served on the Michigan Association of Broadcasters ("MAB") Board of Directors, including service as chairman in 2005-2006. In addition, I have served on the Board of Directors for the MAB Foundation, serving as chairman in 2012-2013. I serve on the Radio Advertising Bureau Small Market Advisory Committee and have been a featured and panel speaker on small market radio at multiple NAB and Radio Advertising Bureau annual conferences as well as at MAB and the Illinois Broadcasters Association events.

WLEN RADIO AND ITS DISTINCTIVE PROGRAMMING

7. Lenawee Broadcasting, the licensee of WLEN, has always been a family company. My father put WLEN on the air in June 1965 at a time when few people had FM

radios. The station's first promotion was to give away FM radios so that people could hear the transmission. Unfortunately for many in our listening area, we went on the air two months too late, as devastating tornados swept a nearby community on Palm Sunday in April of that year. WLEN was not yet broadcasting to be able to warn the community of the danger, and two tornados in the same path on the same day killed many local citizens.

8. Our company is unique. We believe that "if you build it, they will come." WLEN has received national, regional, and state recognition for news, public service, and promotions. It has won many awards – including five NAB Crystal Radio Awards in 1998, 2001, 2005, 2010, and 2014 for excellence in community service, three NAB Education Foundation Service to America Awards, Service to Children Awards, one NAB Marconi Award for AC Station of the Year, and seven MAB Station of the Year Awards in 2002, 2003, 2005, 2006, 2008, 2009, and 2011. WLEN also was named the 2010 NAB Small Market Station of the Year and has been recognized by the University Press Club.

9. WLEN offers unique programming. We are located on a very crowded dial, with fifty-six small, medium, and major market signals coming into the community, so to distinguish ourselves, we have to offer programming that is different and relevant to the citizens of Lenawee County. We focus on local news and local community information, employing a full time news department and the services of a meteorologist. Our county has no local television stations and only one daily newspaper, so the public depends on us for local news and information. We aired nearly 4,000 newscasts and nearly 17,000 weather programs in 2013 alone and do over 100 remote broadcasts from the community each year. We have a weather line with the latest forecast available 24/7 as well as the local forecast from the National Oceanic and Atmospheric Administration ("NOAA") available on our website, and have even donated tower space for

NOAA's use. We broadcast a four-minute community calendar five times a day, a fifteen-minute local information program called "Community Conversation" four to five times weekly hosted by our Program Director, and "Partyline Now," a three-and-a-half hour talk show that serves as a citizens' public forum. We also cover city/village, township, and county government meetings each month as well as eleven local school districts. In addition, we air Radio Picoso, the county's only live and local Hispanic radio show each week connecting to the large Spanish speaking population in our community.

10. While we do play music and are considered an Adult Contemporary format station, music is not the number one reason why people listen to WLEN, and it is not what makes us unique. If listeners were only interested in hearing wall-to-wall music, there are many other ways for them to do so. Rather, it is our local community focus that makes us stand out in the crowd. Even our music programming is live and local, with the exception of two weekend specialty shows.

11. WLEN carries more local sports than any other local station in our area. In the fall, we carry Adrian High School Maple football and football from two of our colleges, Siena Heights University and the Adrian College Bulldogs. Our basketball schedule includes an all-county schedule of high school and college games. WLEN's coverage includes live play-by-play commentary on these events. A listing of the programming that we offer is included as NAB Ex. 24.

12. Our staff consists of fourteen full-time and three part-time broadcast professionals. This is a very large staff for a station in our size community. The reason we employ such a large staff is to be able to provide the citizens in our coverage area with the

information they want and need, with live announcers nineteen hours each day, Sunday through Friday, and eleven hours on Saturdays.

13. Our on-air talent and the loyalty our listeners develop towards those personalities is another reason WLEN stands out in a crowded market. Our morning show host, Steve Barkway, has been with the station for over thirty years. Our night shift DJ from 6 p.m. until midnight weekdays, Mike Reynolds, has been with WLEN for sixteen years. We have about 150 years of combined experience under our roof.

WLEN'S STRONG COMMITMENT TO COMMUNITY SERVICE

14. A core part of who we are is our service to the Lenawee County community in which we broadcast. WLEN takes community service very seriously. This is yet another attribute that makes radio broadcasters and their programming so different from online music services that simply play wall-to-wall music and have no real connection to the communities where their listeners are.

15. WLEN listeners are very loyal to the station because WLEN is loyal to its listeners. We donate over \$800,000 in cash and in-kind advertising and promotion to local nonprofits each and every year. Our announcers and staff volunteer hundreds of hours, both on and off the clock, sitting on nonprofit boards, emceeding local fundraising auctions, running coat and blanket drives, and collecting funds for homeless veterans and socks and pjs for our unattended youth. In 2012, we launched a public service announcement ("PSA") contest for youth to bring awareness to bullying in our schools. WLEN also has participated in community events such as walking in the "Walk for Warmth" to help needy families pay their utility bills and has participated in "learn to read month," reading to kids in schools. In 2013 alone, WLEN broadcast over 54,000 public service announcements and generated more than 400 hours of community affairs programming.

16. As I mentioned above, we also keep our listeners safe during weather emergencies. We are the only local station in our area to have auxiliary power at both our studio and transmitter sites, which keeps us on the air during power outages and storms.

17. Homelessness, hunger, and unemployment are priority needs in our community. WLEN has especially worked to meet those needs. While we have always served, we saw a much greater need when the great recession hit Michigan and the pool of those able to help greatly diminished with our population decline. People left the state to find work, and those who couldn't now needed services they never dreamed they would ever need. And those that needed services before the recession needed more services than ever before. Our focus was helping those in need and promoting ways to achieve self-sufficiency. As a 3,000-watt single FM station in a community of 20,000, we reach over 100 organizations; from local food banks to education and housing programs. In 2013, we assisted local non-profit organizations in raising over \$2,000,000 in community by giving through donations of cash, advertising, and promotion.

18. Several years ago, we implemented our "Hometown Hope" program because we saw a critical need in the non-profit community. Organizations needed help getting information out to the population that could help them. Each month, we donate a \$3,500 marketing grant to a different local non-profit organization. These organizations receive a two-hour live broadcast, a fifteen-minute interview on our "Community Conversation" program, and a live interview on our morning show, as well as a bank of 150 commercial/PSA announcements for their use during the month. We also featured these charities on our website. WLEN's 2013 Report to the Community describes the twelve charities that we helped in that year and many of the other ways in which we served the Lenawee County community in 2013. See NAB Ex. 25. We will always

work to continue to strengthen our local community and help people and organizations help themselves and help each other.

19. As a result of these strong community ties and the ways that we differentiate ourselves in the market, WLEN maintains a very large portion of the over-the-air radio audience in Lenawee County, Michigan.

WLEN'S DECISION NOT TO STREAM

20. We have considered whether to stream WLEN as another means of reaching our listeners. Other than local sporting events, political debates, and some governmental meetings of community interest, however, we decided against it because we are concerned with the unpredictable cost of SoundExchange royalties. These costs can rapidly spiral out of control under the current per-performance structure because they increase with increased listenership.

21. We are particularly concerned about incurring expensive and unpredictable SoundExchange royalties if our stream were to become popular among our listeners. To help me assess the potential financial impact on our station of SoundExchange royalties, I calculated what those fees would be if we had 100 listeners on average to our stream. At the 2014 rate of \$0.0023 per performance, and assuming that eleven recordings per hour are transmitted, those fees would be \$61 per day, or over \$22,000 per year. We do not believe that streaming would generate additional revenues sufficient to cover these significant royalties, let alone the other costs that would be incurred if we began to stream, which reinforces our decision not to stream. The more popular we become, the more unpredictable and expensive the costs would be, and we would be paying those costs for the least unique part of our programming; not for the programmatic reasons that listeners tune in to us. This is an unstable and unpredictable business model, and we cannot just roll the dice.

22. I am not aware of any small broadcasters who are streaming their broadcast programming and making a profit from it.

23. It would be possible for me to impose listener caps on online listening, but I do not believe that this makes business sense. I do not believe that it would be good for our brand, our reputation, or our service to our community if we offered streaming but then barred people from listening to it if it becomes too popular. How would you like to be listener number 101, who could not listen to the stream when you were trying to hear your daughter's name announced as our Student of the Day or as our 4-H member of the week? Or how would you like to be working in an area where you could not receive our terrestrial signal and you needed information because your child's school was just placed in lockdown, or where there was a chemical spill in your neighborhood and your kids were home alone? We would be doing a disservice to our community by limiting our stream.

24. We would reconsider our decision not to stream if the formula for streaming royalties becomes predictable, stable, and reasonable.

Before the
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Washington, D.C.

In The Matter Of:

Determination of Royalty Rates
for Digital Performance in Sound
Recordings and Ephemeral
Recordings (Web IV)

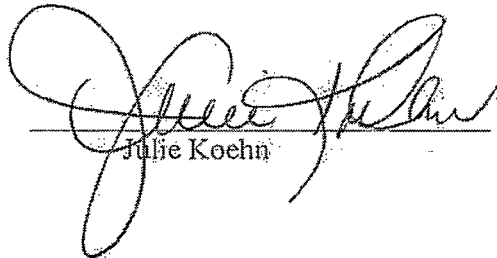
14-CRB-0001-WR (2016-2020)

DECLARATION OF JULIE KOEHN

I, Julie Koehn, declare under penalty of perjury that the matters set forth in my Written
Direct Testimony in the above-captioned proceeding are true and correct to the best of my
knowledge, information and belief.

Executed on

10/6/14


Julie Koehn

**THIS EXHIBIT CONTAINS
RESTRICTED INFORMATION
SUBJECT TO PROTECTIVE ORDER
ENTERED IN DOCKET NO. 14-CRB-
0001-WR (2016-2010) (Web IV). IT WAS
THEREFORE OMITTED FROM THE
PUBLIC VERSION.**

**THIS EXHIBIT CONTAINS
RESTRICTED INFORMATION
SUBJECT TO PROTECTIVE ORDER
ENTERED IN DOCKET NO. 14-CRB-
0001-WR (2016-2010) (Web IV). IT WAS
THEREFORE OMITTED FROM THE
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www.wileyrein.com

November 18, 2014

Michael L. Sturm
202.719.7008
msturm@wileyrein.com

VIA E-MAIL

Kuruvilla J. Olaso, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560

Dear Kuru:

I write in response to your November 13, 2014 letter to my partner, Bruce Joseph, as well as to follow-up on our conversation yesterday afternoon and your subsequent email. I will address each of the four items in your letter.

We spent a considerable period of time discussing SoundExchange's multiple requests for financial information from NAB's members; unfortunately, that discussion was not fully captured in your subsequent email. As I indicated, NAB provided detailed financial information for the companies of the two witnesses who addressed such matters in their written direct testimony (Ben Downs of Bryan Broadcasting and John Dimick of Lincoln Financial Media Corporation). Notably, SoundExchange did not question the sufficiency of the financial production from those companies, either in its November 13 letter or on our call.¹

It was my understanding that you agreed on our call that, merely by providing testimony, a witness does not thereby automatically subject his or her company to financial discovery. Indeed, given SoundExchange's responses to the services' discovery, it could not credibly take a different position. The primary question, therefore, is whether the requests at issue are "directly related" to the witness's testimony under 17 U.S.C. § 803(b)(6)(C)(v). In our view, this standard is not met, as is evident from comparing the extremely broad requests to the limited testimony that purportedly justifies them.

We have reviewed the two items specifically referenced in your letter; namely, the statement by Robert Kocak that "[d]evelopment of new talent, or the introduction of talent to a new market, can require a substantial investment of time and marketing expense . . . except perhaps in very small markets, nothing gets on the air without

¹ In this regard, Rose Ehler's November 13 letter to John Thorne misrepresents NAB's position and its production. As we discussed, NAB did look to its witnesses' companies for financial information -- specifically the companies of the witnesses who testified about financial matters.



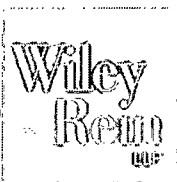
Kuruvilla J. Olaso, Esq.
November 18, 2014
Page 2

analysis, testing, refinement, and promotion, all of which cost money.” The extraordinarily broad and intrusive financial discovery (e.g., audited and unaudited financial statements, every separate revenue source, and every separate cost) that SoundExchange has demanded cannot be characterized as “directly related” to the single, narrow, unquantified statement made by Mr. Kocak without stretching the concept of “directly related” far beyond the breaking point. I would also note the contrast between Mr. Kocak’s unquantified (and presumably self-evident) statement regarding the development of talent and the much more specific statements of SoundExchange witness Darius Van Arman (e.g., at 6: “in just the past five years, the digital revenues of the Secretly Group labels . . . have more than tripled, and they have grown from approximately fifty (50) percent of our distribution revenues to approximately sixty five (65) per cent.”). Nevertheless, it is my understanding that SoundExchange has refused to produce documents directly related to these specifically quantified statements or other requested financial documents from Mr. Van Arman’s company directly related to his testimony. Likewise, the statement by Julie Koehn that “I am not aware of any small broadcasters who are streaming their broadcast programming and making a profit from it” is simply based on her understanding of activities by others, does not bear on Lenawee’s financials, and cannot possibly be read to justify the burdensome discovery from others that SoundExchange demands.²

In our call, I asked if there were some limited subset of documents that might represent an accommodation. From your follow-up email, however, it appears that SoundExchange has simply reiterated all its requests noted in your letter. For the reasons discussed on the phone, among others, and as amplified here, we do not believe these requests are proper.

In contrast to the financial requests discussed above, I believe that we are generally on the same page with respect to the remainder of the requests discussed during our call. You asserted SoundExchange’s position that NAB was obligated to produce documents in the possession, custody or control of NAB that are directly related to statements made by Michael Katz that are identified in Requests for Production 19-21 and to the statement made by Steven Newberry that is referenced in Request for Production 8. Although we believe it is unlikely, we will check with NAB to determine whether it has any documents responsive to Requests 19-21 (regardless

² To clarify one statement made yesterday, Lenawee does not stream sound recordings, as I indicated, but it does occasionally stream live high school sporting events and community events.



Kuruvilla J. Olasa, Esq.
November 18, 2014
Page 3

of whether those documents were reviewed by Dr. Katz). With respect to Request 8, NAB previously confirmed that Mr. Newberry did not rely on (and neither he nor his company possesses) responsive documents. We will also check whether NAB has documents relating to Mr. Newberry's statement that is the subject of Request 8. We will confirm the result of this inquiry by separate letter.

Finally, your November 17, 2014 accurately summarizes our present understanding with respect to the two Triton-related requests. We understand that you will discuss these issues with your colleagues and get back to us as appropriate; we will then consider our response.

I am glad that we were able to make some progress on these issues. Please feel free to contact me if you would like to discuss these issues further.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Michael L. Sturm".

Michael L. Sturm

cc: Bruce G. Joseph, Esq.

H

Sturm, Michael

From: Olasa, Kuruvilla <Kuruvilla.Olasa@mto.com>
Sent: Monday, November 17, 2014 3:10 PM
To: Sturm, Michael; Joseph, Bruce; Ablin, Karyn; Volkmar, Jillian
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren
Subject: RE: Web IV - NAB's Responses to SoundExchange's Requests for Production of Documents

Michael,

Thank you for participating in the meet-and-confer call today. Here is a short summary of the call and what we both agreed to do. Please let me know if I have misunderstood anything.

First, you will check internally to determine whether and to what extent you will produce documents from Greater Media, Lenawee, Bryan Broadcasting, and Lincoln that are responsive to RFP Nos. 11, 25-29 (financial documents, projections, and presentations). You noted that it is NAB's position that its members' documents are not within NAB's possession, custody, or control. You also noted that NAB has already obtained and produced some financial documents for Bryan Broadcasting and Lincoln. You agreed to get back to me tomorrow on whether any additional documents will be produced. I agreed that RFP No. 11, related to streaming revenue, does not apply to Lenawee based on your representation that Lenawee has not engaged in streaming.

Second, you understand our position with respect to the documents related to Dr. Katz's testimony, and you will check with your client to determine whether it has any such documents. (RFPs. No 19 – 21). You agreed to get back to me as soon as possible—hopefully by tomorrow.

Third, you will check on whether there are any documents related to Mr. Newberry's statement that have not been produced.

Fourth, with respect to documents related to Mr. Gadoury's testimony, you informed me that Mr. Gadoury did not rely on any documents in formulating this testimony and that Triton does not currently have any documents that show the number of times the circumstances recounted by Mr. Gadoury have occurred. You noted that Triton indicated that it may be possible to prepare such information at great burden. I agreed to discuss this issue internally and get back to you.

Best regards,
Kuru

From: Sturm, Michael [mailto:MSturm@wileyrein.com]
Sent: Saturday, November 15, 2014 4:07 PM
To: Olasa, Kuruvilla; Joseph, Bruce; Ablin, Karyn; Volkmar, Jillian
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren
Subject: RE: Web IV - NAB's Responses to SoundExchange's Requests for Production of Documents

Thanks, talk to you then.

From: Olasa, Kuruvilla [<mailto:Kuruvilla.Olasa@mto.com>]
Sent: Saturday, November 15, 2014 7:05 PM
To: Sturm, Michael; Joseph, Bruce; Ablin, Karyn; Volkmar, Jillian
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren
Subject: RE: Web IV - NAB's Responses to SoundExchange's Requests for Production of Documents

Michael,

Let's do 1:45 eastern/ 10:45 pacific. I will circulate a calendar invitation and dial in.

Thanks,
Kuru

From: Sturm, Michael [<mailto:MSturm@wileyrein.com>]
Sent: Saturday, November 15, 2014 3:47 PM
To: Olasa, Kuruvilla; Joseph, Bruce; Ablin, Karyn; Volkmar, Jillian
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren
Subject: RE: Web IV - NAB's Responses to SoundExchange's Requests for Production of Documents

Kuru, a couple of us have a meeting at noon Eastern on Monday. Could we do the call either at 11E/8P (if that is not too early for you) or just after (say 1:45E/10:45P). Let me know if one of those times would work.

Thanks,

Michael

From: Olasa, Kuruvilla [<mailto:Kuruvilla.Olasa@mto.com>]
Sent: Friday, November 14, 2014 5:44 PM
To: Sturm, Michael; Joseph, Bruce; Ablin, Karyn; Volkmar, Jillian
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren
Subject: RE: Web IV - NAB's Responses to SoundExchange's Requests for Production of Documents

Michael,

Can we have the call at 9:00 am Pacific/ 12:00 p.m. Eastern? If that works for your side, I will circulate a calendar invitation and dial in.

Best regards,
Kuru

From: Sturm, Michael [<mailto:MSturm@wileyrein.com>]
Sent: Friday, November 14, 2014 9:07 AM
To: Olasa, Kuruvilla; Joseph, Bruce; Ablin, Karyn; Volkmar, Jillian
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren
Subject: RE: Web IV - NAB's Responses to SoundExchange's Requests for Production of Documents

Kuru, in response to your letter received yesterday afternoon, we are tied up today but would be available to discuss on Monday. Could you propose some times on Monday that would work for you and your colleagues? We are relatively flexible.

Thanks, Michael Sturm

From: Olasa, Kuruvilla [<mailto:Kuruvilla.Olasa@mto.com>]

Sent: Thursday, November 13, 2014 3:12 PM

To: Joseph, Bruce; Ablin, Karyn; Sturm, Michael; Volkmar, Jillian

Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren

Subject: Web IV - NAB's Responses to SoundExchange's Requests for Production of Documents

Counsel,

Please see the attached letter.

Best,

Kuru

Kuruvilla J. Olasa | Munger, Tolles & Olson LLP

355 South Grand Avenue | Los Angeles, CA 90071

Tel: 213.683.9530 | Kuruvilla.Olasa@mto.com | www.mto.com

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From: Olasa, Kuruvilla <Kuruvilla.Olasa@mto.com>
Sent: Friday, November 21, 2014 6:37 PM
To: Sturm, Michael
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren; Mills, Chris; Ablin, Karyn; Joseph, Bruce
Subject: RE: Web IV

Michael,

Thank you for getting back to me. Unfortunately, it appears that we are at an impasse and that we need to present this issue to the Judges. We continue to believe that Lenawee's and Greater Media's finances are "directly related" to NAB's written direct statement. With respect to Lenawee, for instance, Ms. Koehn testified that:

"Our main reason for this [i.e. for not streaming] is that we would be required to pay royalties to SoundExchange for the least unique part of our programming, and these royalties are much too variable and unpredictable to be able to design a stable business plan for streaming." Koehn WDT ¶ 4 (emphasis added).

To help me assess the potential financial impact on our station of SoundExchange royalties, I calculated what those fees would be if we had 100 listeners on average to our stream. At the 2014 rate of \$0.0023 per performance, and assuming that eleven recordings per hour are transmitted, those fees would be \$61 per day, or over \$22,000 per year. . . . This is an unstable and unpredictable business model, and we cannot just roll the dice. Koehn WDT ¶ 21.

It would be possible for me to impose listener caps on online listening, but I do not believe that this makes business sense. Koehn WDT ¶ 23.

To test this testimony, we need to understand Lenawee's overall finances and how streaming would affect those finances.

Best regards,
Kuru

From: Sturm, Michael [mailto:MSturm@wileyrein.com]
Sent: Friday, November 21, 2014 12:54 PM
To: Olasa, Kuruvilla
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren; Mills, Chris; Ablin, Karyn; Joseph, Bruce
Subject: RE: Web IV

Kuru,

I write in response to your email of 10:47 pm last evening. As previously indicated, I was in court this morning, so I asked my colleagues to assist in preparing a response so we could get back to you as promptly as possible.

With respect, you have never articulated how SoundExchange contends that the comprehensive financial discovery that it seeks from Lenawee or Greater Media could possibly be "directly related" to the narrow

testimony by those witnesses. And whatever standard SoundExchange may articulate in its motion, it is clear that it is not applying that standard to its own witnesses.

In that regard, you should compare the testimony of Ms. Koehn and Mr. Kocak to the testimony of SoundExchange's witnesses. Ms. Koehn makes no statements whatsoever about her company's finances. Lenawee is not streaming sound recordings at all, and thus has no financial information concerning the statutory licenses at issue in this case. Mr. Kocak did not testify about the economics of streaming or about Greater Media's overall financial condition. Rather, he made one statement from his personal knowledge about a narrow point – that it is costly and time consuming to develop on-air talent.

By contrast, Simon Wheeler testified extensively about his company's revenues, including the importance of streaming to those revenues, ¶¶ 25-29, the importance of substantial statutory license rates to his company, ¶¶ 43, and "expending . . . substantial resources to negotiate, license, and deliver" its artists music" (¶¶ 10-12, 17, 46). He also testifies in more detail than is found in the testimony of Mr. Kocak on which you rely about spending "considerable time and effort to find new quality artists . . . maintaining a staff that supports and assists [its] artists . . . work[ing] with [its] artists to provide them a creative and professional home" and other expenditures, ¶ 46. Similarly, Darius Van Arman speaks at length about his company's investment in artists and recordings, his company's business model, the reliance of his company on digital revenues (at 4-6), and the importance of digital breakage revenues to his company (at 10-13). Fletcher Foster testifies about the "investments recording artists make in their music" and "the importance to the recording artists of the royalties that are the subject of this proceeding" (¶¶ 7-10, 14), that his company is "investing significant sums of money and time in certain artists (¶ 16) and about the importance of statutory royalties to artists (¶ 22-24). Raymond Hair testifies about the "importance of the revenue stream from the compulsory digital performance license to recording artists and musicians" (at 4-5).

Notwithstanding this testimony, SoundExchange has objected specifically to producing financial information (sought in Licensee Participants' DRs 11-13, 18) for any independent record company or for Iconic, and has objected generally to producing any information from witnesses or entities that do not address a particular topic (General Objection 13) or "to the extent they seek documents in relation to general testimony that was based on a witness's knowledge, experience, and/or generally acknowledged facts," such as the cited statements of Julie Koehn and Robert Kocak (General Objection 16). How is it that only SoundExchange witnesses can speak from general knowledge? And SoundExchange has produced only very limited financial information from those companies even though they (unlike Greater Media and Lenawee) put their finances directly at issue.

With respect to Lincoln Financial Media and Bryan Broadcasting, you first raised issues with respect to the production from those companies late Wednesday night. You have never articulated why SoundExchange believes that balance sheets of the two companies are directly related to the companies' written direct statements. Unlike SoundExchange, NAB's witnesses have not made an issue of any company's assets or liabilities, overall financial health, or the effect of streaming on any of the above. Rather, the two companies' testimony discusses the economics of simulcast streaming. Thus, while we don't believe that SoundExchange is entitled to balance sheets based on the testimony, we would ask Lincoln Financial and Bryan if they would provide those statements if it would obviate the need for a motion; we could let you know about this on Monday morning. With respect to forecasts from Lincoln Financial Media and Bryan Broadcasting, we are inquiring what the companies may have. We have not yet received a response.

I will be around this afternoon if you want to discuss any of this.

Michael

From: Olasa, Kuruvilla [<mailto:Kuruvilla.Olasa@mto.com>]

Sent: Thursday, November 20, 2014 10:47 PM

To: Sturm, Michael

Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren; Mills, Chris; Ablin, Karyn; Joseph, Bruce

Subject: RE: Web IV

Michael,

We previously discussed over the telephone why SoundExchange believes it is entitled to review Lenawee's and Greater Media's financial documents. Obviously we have a fundamental disagreement as to the relevance of those documents. If, however, you believe that it would be helpful to go over these issues again, I would be happy to discuss them again tomorrow. I am open most of the day, so just let me know when works for you. We certainly have no interest in filing needless motions, so if we can resolve this amicably that would be preferable.

With respect to Lincoln's and Bryan's financial statements, I believe that SoundExchange is entitled to both balance sheets as well as budgets and financial forecasts. Again, I would be happy to discuss this request tomorrow. Given that you will be in court tomorrow morning, consider my request for a response by 10:00 a.m. withdrawn. At the same time, however, SoundExchange cannot allow this issue to drag on for too long. Given the upcoming holidays and the discovery cutoff, we need to ensure that we are in a position to obtain sufficient documents to evaluate and respond to NAB's case.

Thanks,
Kuru

From: Sturm, Michael [<mailto:MSturm@wileyrein.com>]

Sent: Thursday, November 20, 2014 7:28 PM

To: Olasa, Kuruvilla

Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren; Mills, Chris; Ablin, Karyn; Joseph, Bruce

Subject: Re: Web IV

I'm going to be in federal court through at least early afternoon tomorrow on another matter so I'm not going to be able to respond in great detail to your 8:30 pm email by your 10 am deadline. If we obtain balance sheets for LFMC and Bryan, the only two NAB fact witnesses who actually discussed financial matters, does that resolve the issue? Or, as it now appears, is SoundExchange simply determined to harass NAB and its witnesses and file a motion for tactical reasons? Despite all the demands you have made we still have had no explanation for how Lenawee's audited financial statements and balance sheets could be directly related to anything, especially when Lenawee doesn't stream sound recordings and the witness does not discuss Lemawee's finances at all let alone its balance sheet. Obviously we can't stop you from filing a motion but the standard is directly related and it isn't remotely met here. Have a good evening.

Sent from my iPhone

On Nov 20, 2014, at 8:33 PM, "Olasa, Kuruvilla" <Kuruvilla.Olasa@mto.com> wrote:

Hi Michael,

Thank you for getting back to me.

Given the compressed schedule for discovery, we think we need to raise with the Judges our fundamental disagreement regarding the relevance of NAB's members' finances. For instance, we understand that NAB still declines to produce *any* financial information for Lenawee and for Greater Media. With respect to Lincoln and Bryan, please let me know by 10:00 a.m. Eastern Time tomorrow

whether NAB will produce (1) balance sheets and (2) budgets and financial forecasts. We have reviewed the documents you identified for Lincoln, and they do not include forward looking forecasts. To the contrary, they compare Lincoln's performance to its past forecasts. These documents, do, however, indicate that Lincoln does maintain financial budgets and forecasts.

Best regards,
Kuru

From: Sturm, Michael [<mailto:MSturm@wileyrein.com>]
Sent: Thursday, November 20, 2014 4:51 PM
To: Olasa, Kuruville
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren; Mills, Chris; Ablin, Karyn; Joseph, Bruce
Subject: RE: Web IV

Kuru,

In response to your email received last night:

NAB produced financial documents for Bryan Broadcasting ("Bryan") and Lincoln Financial Media Company ("LFMC"), located at:

Bryan Broadcasting-NAB00003091; NAB00003096-3101; NAB00003103; NAB00003105-07;
NAB00005654-5753

Lincoln Financial Media-NAB00002988-89; NAB00003032-40; NAB003083; NAB00005211-12;
NAB00006154-6292

With respect to projections, forecast and budgets, we will confirm with Bryan what, if any, responsive information is available. For LFMC, budget/forecast information can be found on the profit and loss statements, which reflect "current" and "plan" data for the various categories of expenses and revenue tracked on those documents. For "streaming revenue and expenses," the financial documents provided reflect the streaming revenue and expenses at the level tracked by the two companies. It is our understanding that all of the revenue and expense information discussed in the respective statements of Mr. Downs and Mr. Dimick is supported by the financial documents that have been produced. Balance sheets were not produced by Bryan or Lincoln. While we are willing to discuss the issue, NAB believes that balance sheet financial information is not directly related to the limited testimony of Mr. Downs or Mr. Dimick.

Michael

From: Olasa, Kuruville [<mailto:Kuruville.Olasa@mta.com>]
Sent: Wednesday, November 19, 2014 9:22 PM
To: Sturm, Michael
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren; Mills, Chris; Ablin, Karyn; Joseph, Bruce
Subject: RE: Web IV

Michael,

We went back to look at NAB's production of financial documents related to Lincoln and Bryan Broadcasting, but, other than certain income or profit & loss statements, we do not see documents responsive to our requests related to financial documents. Could you confirm whether, with respect to Lincoln and Bryan Broadcasting, NAB produced the following documents:

1. Balance sheets for 2011 – 2014.
2. Financial projections, forecasts, and budgets.
3. Streaming revenues and expenses.

Since we cannot locate these documents, it would be helpful if you could point us to these documents by Bates range.

Best regards,
Kuru

From: Olasa, Kuruvilla
Sent: Tuesday, November 18, 2014 7:09 PM
To: 'Sturm, Michael'
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren; Mills, Chris; Ablin, Karyn; Joseph, Bruce
Subject: RE: Web IV

Michael,

Thank you for the response. I am glad we could reach an agreement regarding the documents related to Dr. Katz's testimony. With respect to our request for financial documents, I understand NAB's position and it appears that further discussion would be fruitless. Finally, with respect to the Triton-related document requests, we will accept your representation that Triton does not have any responsive documents and could not create any such documents without a significant effort. In the event that this fact changes, please supplement your production promptly.

Best regards,
Kuru

From: Sturm, Michael [<mailto:MSturm@wileyrein.com>]
Sent: Tuesday, November 18, 2014 2:20 PM
To: Olasa, Kuruvilla
Cc: Pomerantz, Glenn; Klaus, Kelly; Choudhury, Anjan; LeMoine, Melinda; Ehler, Rose; Ruitberg, Lauren; Mills, Chris; Ablin, Karyn; Joseph, Bruce
Subject: Web IV

Kuru, please see the attached letter following up on our meet-and-confer yesterday.

Michael

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